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Relevant Docket Entries

Date	*Proceedings*
12–27–66	Information.
3–29–67	Trial for Violating Section 136 of General Business Law—Decision Reserved.
5– 5–67	Defendant found guilty, Judge Basel dissenting; Sentenced to $500 or 60 days in jail.
6–13–68	Appellate Term of Supreme Court, First Department affirms conviction without opinion.
6–28–68	Leave to Appeal to New York Court of Appeals granted.
2–18–70	Decision of New York Court of Appeals affirming conviction.
2–18–70	Order of New York Court of Appeals affirming conviction entered.

Information

CRIMINAL COURT

OF THE CITY OF NEW YORK

Part 7B, County of New York

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.:*

Patrolman John P. Burns of No. 19 Precinct, County of New York, City of New York, being duly sworn, deposes and says that on December 27, 1966 and December 28, 1966, at about 8:30 A.M. on December 27 and 5:30 P.M. on December 28 on second floor at 818 Madison Avenue in the County of New York. State of New York, the defendant STEPHEN RADICH did commit the crime of: did violate section 1425 of the New York State Penal Law, subdivision 16—Paragraph d and f, in that any person who shall publicly mutilate, deface, defile or defy, trample upon, or cast contempt upon the flag, standard, shield or ensign, of the United States of America, either by words or act or shall publicly carry or display any emblem, placard or flag which casts contempt, either by word or act, upon the flag of the United States of America:

under the following circumstances:

your deponent states that at the above location, the Radich Gallery, on December 27, 1966 at 8:30 A.M., he observed that the defendant did have on display, in a large window, facing the public sidewalk, the flag of the United States of America, in the form of a body hanging from a yellow noose. Deponent further states that on December 28, 1966 at about 5:30 P.M., at the above mentioned location, the

defendant did have on public display and for public viewing, the flag of the United States of America, in the following manner; 1—in the form of a male sexual organ, protruding from the body of form, in the anterior portion of the body of the form and depicting the erected male penis, protruding from a form of a cross. 2—the flag of the United States of America, wrapped in a chained bundle. 3—The standard of the United States on the form of an alleged elephant. 4—The Union of the flag of the United States of America, depicted in the form of an octopus. 5—The American flag attached to a gas meter. 6—The American flag wrapped around a bundle attached to a two wheeled vehicle. 7—The American flag in the form of a body, hanging from a yellow noose. Your deponent further states that the defendant is the owner and operator of the premises mentioned above.

Wherefore deponent prays that the defendant be dealt with according to law.

Sworn to before me
January 4, 1967

/s/ Ptl. John P. Burns
/s/ (Illegible)
Judge, Criminal Court of the City of New York

Order of Court of Appeals Below

COURT OF APPEALS

STATE OF NEW YORK, *ss.*:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 18th day of February in the year of our Lord one thousand nine hundred and seventy, before the Judges of said Court.

WITNESS,

THE HON. STANLEY H. FULD,

Chief Judge, Presiding.

RAYMOND J. CANNON,

Clerk.

REMITTITUR February 18, 1970.

App. T. 1. No. 368.

THE PEOPLE &c.,

Respondent,

vs.

STEPHEN RADICH,

Appellant.

BE IT REMEMBERED, That on the 22nd day of August in the year of our Lord one thousand nine hundred and sixty-nine, Stephen Radich, the appellant in this cause, came here unto the Court of Appeals, by Richard G. Green and Shirley Fingerhood, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the

judgment of the Appellate Term of the Supreme Court in and for the First Judicial Department. And The People &c., the respondent in said cause, afterwards appeared in said Court of Appeals by Frank S. Hogan, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Richard G. Green, of counsel for the appellant, and by Mr. Jerry Slater, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment herein be and the same hereby is affirmed.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Criminal Court of the City of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Criminal Court of the City of New York, before the Judges thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Criminal Court, before the Judges thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals
of the State of New York.

Majority Opinion of New York Court of Appeals

STATE OF NEW YORK

COURT OF APPEALS

THE PEOPLE &c.,

Respondent,

—v.—

STEPHEN RADICH,

Appellant.

OPINION

GIBSON, J.:

The issue is whether defendant's conviction of a violation of New York's flag desecration statute was in contravention of his right of free speech under the First Amendment to the Constitution of the United States. The particular penal provision found to have been violated provides, in substance, that any person who shall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon the flag of the United States of America, either by words or act, shall be guilty of a misdemeanor (former Penal Law, §1425, sub. 16, par. d, now General Business Law, §136, subd. d). The constitutional question in respect of the proscribed defilement by an "act," rather than by "words," was expressly left open in *Street* v. *New York* (394 U.S. 576, 594), which reversed our affirmance of a conviction under this same statute (*People* v. *Street*, 20 N.Y.2d 231). We have concluded that the conviction in the case now before us infringed no constitutional guarantee.

The defendant, the proprietor of an art gallery in the City of New York, publicly displayed and exposed for

sale, certain "constructions," comparable to sculptures, which had been fashioned by an artist as expressive of protest against the Vietnam war and which, in each case, prominently incorporated the American flag.

The complaint, upon which defendant was charged and convicted, alleged, among other violations of the statute, that defendant publicly displayed the flag of the United States of America in the form of the male sexual organ, erect and protruding from the upright member of a cross; also, in the form of a human body, hanging from a yellow noose; and, again, wrapped around a bundle resting upon a two-wheeled vehicle, shown by photographs in evidence to resemble a gun caisson.[1]

For the purposes of this opinion it seems necessary to discuss only the first of the constructions complained of. Testifying in his own behalf, the defendant said that this was protest art; and that during the exhibition of the constructions, background music, consisting of war protest songs, was played from a tape. Asked, on cross-examination, as to the use of the flag for the purpose of protest, he said that the object extending from the vertical member of the cross and wrapped in a small flag was representative of a human penis; that tassels at the base of

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[1] The allegations, in full, were that "the defendant did have on public display and for public viewing, the flag of the United States of America, in the following manner; 1—in the form of a male sexual organ, protruding from the body of form, in the anterior portion of the body of the form and depicting the erected male penis, protruding from a form of a cross. 2—the flag of the United States of America, wrapped in a chained bundle. 3—The standard of the United States on the form of an alleged elephant. 4—The Union of the flag of the United States of America, depicted in the form of an octupus [*sic*]. 5—The American flag attached to a gas meter. 6—The American flag wrapped around a bundle attached to a two wheeled vehicle. 7—The American flag in the form of a body, hanging from a yellow noose."

this protrusion represented "probably * * * decorative or pubic hair, depending on what one decides it looks like to him." [2] Asked as to the particular expression and protest intended to be conveyed, the witness said that perhaps the penis represents the sexual act, which by some standards is considered an aggressive act; that organized religion is also symbolized by the figure, which seems to suggest that organized religion is supporting the aggressive acts suggested.

Only recently this court had occasion to give extended consideration to section 1425 of the former Penal Law and specifically to paragraph d thereof. In *People* v. *Street* (20 N.Y.2d 231, revd. 394 U.S. 576, *supra*) we affirmed the conviction of a defendant who, upon hearing of the shooting of the civil rights leader James Meredith, took an American flag to a street corner, burned it, saying, "We don't need no damned flag," and made other statements to people who gathered to watch these actions, one of these being the arresting policeman, to whom defendant said: "If they left that happen to Meredith, we don't need an American flag." The crux of the defense was that defendant's acts and speech were proper forms of protest legitimized by the First Amendment. Synopsizing Chief Judge Fuld's opinion upholding the conviction, we find the position of the court to be this: While nonverbal expression may be a form of speech within the protection of the First and Fourteenth Amendments, the same kind of freedom is not afforded to those who communicate ideas by conduct as to those who communicate ideas by

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[2] The "construction" was described in the majority opinion of the Criminal Court as "in the form of a large cross with a bishop's mitre on the headpiece, the arms wrapped in ecclesiastical flags and an erect penis wrapped in an American flag protruding from the vertical standard."

pure speech; that the State may legitimately proscribe many forms of conduct and no exception is made for activities to which some would ascribe symbolic significance; that, in sum, the cases show that the constitutional guarantee of free speech covers the substance rather than the form of communication, but that if the substance is being conveyed by a form violative of the public health, safety or well-being, then the First Amendment protection is subordinated to the general public interest. With regard specifically to the flag desecration statute it was squarely held that it was a valid statute in that, regardless of the major motivating factor behind its enactment, there was a clear legislative purpose to prevent a breach of the peace; that the Supreme Court long ago in *Halter* v. *Nebraska* (205 U.S. 34, 41) stated: "[I]nsults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot." This court said that our statute was designed to prevent the outbreak of such violence by discouraging contemptuous and insulting treatment of the flag in public.

The Chief Judge's opinion then noted that concededly defendant's acts arose out of indignation and a sense of outrage; that the act was one of incitement and as such threatened the public peace, a result which the State is legitimately interested in preventing. With regard to Street's purpose—to express indignation and protest—the parallel to the case before us is clear. Here, the expression, if less dramatic, was given far wider public circulation and, in consequence, perhaps, a measurable enhancement of the likelihood of incitement to disorder, by the placement of one of the constructions in a street display window of defendant's gallery on Madison Avenue in the

City of New York, and the exhibition and exposure for sale of the companion pieces in the public gallery and mercantile establishment within. Implicit in the invitation to view was the opportunity thereby afforded to join in the protest, or in counterprotest, with the consequent potential of public disorder; or so the trier of the facts could properly find.

The Supreme Court's reversal of *Street* (394 U.S. 576, *supra*) seems not to have questioned or disturbed the rationale enunciated there by Chief Judge Fuld. The majority felt that since it could not be determined what part of Street's conviction rested on the fact that he was charged with uttering constitutionally protected words and what part upon his act of setting fire to the flag, the conviction could not be upheld. The majority expressly left open the question concerning the validity of the conviction insofar as it was sustained on the basis that Street could be punished for flag burning "even though the burning was an act of protest" (p. 594).[3]

The dissenters considered that the few words that Street uttered were part of the act of symbolic conduct, from which they could not be separated, and thus posed an issue which the majority opinion should have met.[4]

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[3] Thus, Mr. Justice Harlan, writing for the majority, said: "[W]e reiterate that we have no occasion to pass upon the validity of this conviction insofar as it was sustained by the state courts on the basis that Street could be punished for his burning of the flag, even though the burning was an act of protest. Nor do we perceive any basis for our Brother WHITE's fears that our decision today may be taken to require reversal whenever a defendant is convicted for burning a flag in protest, following a trial at which his words have been introduced to prove some element of that offense." (*Street* v. *New York*, 394 U.S. 576, 594.)

[4] The salient points of dissent may be quoted as follows: CHIEF JUSTICE WARREN: "Since I am satisfied that the constitutionality of appellant's conduct should be resolved in this case and am convinced that this conduct can be criminally punished, I dissent."

While it seems well established that a clear violation of a valid statute may not be saved on First Amendment grounds, it is necessary in this case eventually to reach a somewhat different question, which is, whether or not the act said to constitute the violation is tempered by the application of the First Amendment. In other words, while burning, spitting upon and stomping upon the flag are clearly and inherently disrespectful, do we reach a point where other acts may be performed with regard to the flag which do not so easily admit of the requisite contemptuousness; where the intent behind the act may be of the purest sort, but where the results of the act may nevertheless have the effect which, as Chief Judge Fuld found in *Street*, the statute was validly designed to prevent—the arousement of passions likely to lead to disorder? Before considering that problem, and in aid of its solution, it would be well to examine several significant recent cases.

In *Hoffman* v. *United States* (256 A.2d 567 [Ct. of App., D. C., 1969]), the defendant, who was to testify before the House Un-American Activities Committee, upon approaching the House Office Building was arrested for desecrating the flag, in that he was wearing a shirt that resembled the American flag. He was convicted of breaching that part of the statute which proscribed defilement of the flag. On appeal to the District of Columbia Court of Appeals, Hoff-

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MR. JUSTICE BLACK: "The talking that was done took place 'as an integral part of conduct in violation of a valid criminal statute' against burning the American flag in public. I would therefore affirm this conviction." MR. JUSTICE WHITE: "For myself, without the benefit of the majority's thinking if it were to find flag burning protected by the First Amendment, I would sustain such a conviction." MR. JUSTICE FORTAS: "Protest does not exonerate lawlessness. And the prohibition against flag burning on the public thoroughfare being valid, the misdemeanor is not excused merely because it is an act of flamboyant protest." (394 U.S. 576, 605-617.)

man argued that the statute was vague, that he was entitled to First Amendment protection and that his acts did not constitute defilement since he undertook no physical destruction of the flag. On the vagueness question the court held that the statute admitted of that degree of reasonable certainty as to what could constitute a violation, so that it could not be said that a person possessing a reasonable degree of intelligence could not understand what conduct would be disrespectful to the flag and what conduct would not. The First Amendment argument was rather summarily disposed of, the court relying on the recently decided case of *United States* v. *O'Brien* (391 U.S. 367), a draft card burning case hereinafter discussed. Finally, the court held that wearing the flag, or part of it, as a shirt was a rather clear act of defilement in that the flag was thus dishonored; that the idea of dishonorment was the key to the question whether the flag was defiled. The court concluded (256 A.2d 567, 570) "that the use of the word 'defile' in the subject Statute was intended to include public conduct which brings shame or disgrace upon the flag by its use for an unpatriotic or profane purpose. It is our opinion that the wearing of a shirt which resembles the American flag, under the circumstances of this case, is a physical act which defiles the flag in violation of 18 U.S.C. §700. Such a use of the flag would 'degrade and cheapen the flag in the estimation of the people, as well as to defeat the object of maintaining it as an emblem of national power and national honor'. (*Halter* v. *Nebraska*, 205 U.S. 34, 42)." Similarly, in *People* v. *Cowgill* (—— Cal. App. 2d ——[78 Cal. Rptr. 853], app. dsmd. —— U.S. —— [38 U.S. Law Week 3266; Jan. 19, 1970]), the California court affirmed the conviction of a defendant for

wearing a vest fashioned from a cut-up American flag, in violation of a flag defilement statute, the court posing and then answering affirmatively the question left open in *Street* (*supra*), whether the States have power to protect the flag from acts of desecration and disgrace.

It is necessary to make reference, also, to the draft card burning cases of *United States* v. *Miller* (367 F.2d 72, cert. den. 386 U.S. 911) and *O'Brien* v. *United States* (376 F.2d 538). In *O'Brien,* the First Circuit held that a 1965 amendment to title 50 (§462, subd. [b]) of the United States Code, proscribing destruction of draft cards, was an unconstitutional abridgement of freedom of speech. The Supreme Court disagreed in *United States* v. *O'Brien* (391 U.S. 367, *supra*). The only dissent was that by Justice Douglas. The court, through Chief Justice Warren, noted that the statute on its face deals with conduct having no connection with speech. "It prohibits the knowing destruction of certificates issued by the Selective Service System, and there is nothing necessarily expressive about such conduct. * * * A law prohibiting destruction of Selective Service certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers' licenses, or a tax law prohibiting the destruction of books and records." (391 U.S. 367, 375.) It should be noted that O'Brien publicly burned his card on the South Boston Courthouse steps, a crowd having been attracted by his and his companions' activities. The draft card statute, like the flag statutes, had a legitimate reason behind its enactment.

One of O'Brien's contentions was that the action he took with his draft card was a communication of ideas by conduct and that this conduct expressed his position as re-

gards the war and the draft. As to this the court stated: "However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. * * * a governmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; *if the governmental interest is unrelated to the suppression of free expression*; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." (391 U.S. 367, 376, 377; emphasis supplied.) Of those requisites the flag desecration statute need only be considered with respect to the one above emphasized.

The discussion thus far enables us to reach certain conclusions. It becomes clear, upon considering Chief Judge Fuld's statement in *Street* (20 NY 2d 231, *supra*), along with the authorities there cited, and the more recent cases discussed just above, that a person with the purest of intentions may freely proceed to disseminate the ideas in which he profoundly believes, but he may not break a valid law to do it. The flag statute has been repeatedly held valid from the *Halter* case (*supra*) on down, even through *Hoffman* v. *United States* (*supra*) and *People* v. *Cowgill* (*supra*), where the flag was not, in either case, burned, spit or trampled upon, but was used, in each case, to further political or ideological viewpoints by employment as an article of clothing. There appears no significant difference between those situations and the one we are here considering. The defendant may have a sincere ideological viewpoint, but he must find other ways to express

it. Whether defendant thinks so or not, a reasonable man would consider the wrapping of a phallic symbol with the flag an act of dishonor; he would consider the hanging effigy a dishonor; and to a lesser and more debatable extent it might be found that wrapping the flag in chains, attaching it to a gas meter, and fashioning the other representations involved, were acts dishonoring the flag. The exhibitor who, as in this case, engages to join the artist in the commercial exploitation of the supposed expression of protest stands in no better position.

There appears to be one further question with respect to the First Amendment which the *O'Brien* court (391 U.S. 367, *supra*) was not especially concerned with, having found the draft card law based upon the valid reason that registrants should be required to retain their cards simply to facilitate administration of the act. This question concerns itself with the requirement in *O'Brien*, emphasized above, that the government interest be unrelated to the suppression of free expression.

The *Halter* case (205 U.S. 34, *supra*), at which any investigation of the validity of flag statutes must begin, was decided at a time before the Supreme Court was as concerned with First Amendment rights as it is today. Thus, the effect of *Stromberg* v. *California* (283 U.S. 359), the case cited by the majority in reversing the *Street* conviction (394 U.S. 576, *supra*), deserves consideration. Miss Stromberg conducted a daily ceremony at a children's summer camp during which the children raised the Soviet flag and recited a pledge of allegiance to it. The California statute made it a criminal offense to display a red flag (1) as a symbol of opposition to organized government, or (2) as an invitation to anarchistic action, or (3) as an aid to propaganda of a seditious character. Miss Strom-

berg was convicted under the statute, although it was not made clear which of the three criteria were involved in the breach. The court reversed on the ground that if defendant was convicted for flying the flag as a symbol of opposition, her First Amendment right to freedom of expression had been breached.

However, the statutes prohibiting certain kinds of exhibition of foreign flags, and statutes requiring the salute to our flag (cf. *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624) are clearly designed for no other purpose than communicative suppression whereas a flag desecration statute is aimed at keeping the public peace. While it is true that violations of the flag desecration statute will probably not occur apart from the expression of an idea, the prime reason for the statute was not to insure suppression of such ideas, but rather to insure preservation of the public peace. The *Halter* case (205 U.S. 34, *supra*) still expresses the law as rephrased in *Street* (20 N Y 2d 231, 236, *supra*), where it is stated: "In any event, whatever motivated the Legislature to act, the statutory purpose is clear—it is to prevent a breach of the peace." Some enlightenment may also be gained from the implication to be drawn from the *Stromberg* case (283 U.S. 359, *supra*) that had defendant's conviction rested specifically on either or both of the statutory prohibitions relating to anarchistic or seditious actions, it might have been upheld. We thus conclude that the statute before us does not breach the *O'Brien* requirement (391 U.S. 367, 377, *supra*) that the governmental interest served by it must be unrelated to the suppression of free expression; and we affirm the lower court's conclusion that the legitimate public interest which the statute is designed to protect was threatened by the violation of which defendant was convicted.

Appellant's additional contentions are insubstantial and may be dealt with summarily. The statute is not unconstitutionally vague; and at least two of the "constructions" clearly cast the flag into dishonor. (*Hoffman* v. *United States*, 256 A.2d 567, *supra*; *People* v. *Cowgill*, —— Cal. App. 2d —— [78 Cal. Rptr. 853], app. dsmd. —— U. S. —— [38 U.S. Law Week 3266; Jan. 19, 1970], *supra*.)

Another argument is addressed to the factor of intent; but even if we assume that defendant had an honest political intent in exhibiting these constructions, or that he had no intent at all, that element is not essential to a conviction of violating a statute which is *malum prohibitum*. (*People* v. *Werner*, 174 N.Y. 132, 134; *People* v. *Kibler*, 106 N.Y. 321, 322-323.)

No less tenuous is appellant's claim of denial of equal protection, predicated on the provision exempting from the operation of the statute "a certificate, diploma, warrant, or commission of appointment to office, *ornamental picture*, article of jewelry, stationery * * * or newspaper or periodical, on any of which shall be printed * * * said flag * * * disconnected and apart from any advertisement" (former Penal Law, §1425, subd. 16; emphasis supplied); and equally insubstantial, is his contention based on the grammatical imperfection apparent in paragraph d of subdivision 16, it being clear beyond dispute that "flag" is the intended object, as it is the explicit object of every other act inhibited by the statute.

The order should be affirmed.

Dissenting Opinion of Chief Judge Fuld

I cannot agree with the majority that sufficient legitimate public interest is served by preventing the sale and exhibition of works of art—such as those which formed the predicate for the conviction of the defendant Radich—to justify interference with his right to free expression.

The defendant was the proprietor of a second-floor art gallery on Madison Avenue in New York City. He exhibited for sale seven sculptures, termed "constructions," by an artist named Marc Morrel, in which the latter made use of American flags—or what appeared to be parts of such flags—in various provocative shapes and forms to express protest particularly against the Vietnam War. (See Life Magazine, March 31, 1967, p. 22.) The defendant was charged with defiling and casting contempt upon the flag of the United States, in violation of section 1425, subdivision 16, of the former Penal Law.[1]

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[1] Insofar as relevant, subdivision 16 of section 1425 (now General Business Law, §136) provided:

"16. Any person, who * * *

"d. Shall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon * * * by * * * act, or

"f. Shall publicly carry or display any emblem, placard or flag which casts contempt, either by word or act, upon the flag of the United States of America, * * *

* * * * *

"Shall be deemed guilty of a misdemeanor; * * *

"The words flag, standard, color, shield or ensign, as used in this subdivision or section, shall include any flag, standard, color, shield or ensign, or any picture or representation, of either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be * * * said flag, standard, color, shield or ensign, of the United States of America * * * or a picture or a representation * * * thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation may believe the same to repre-

Dissenting Opinion of Chief Judge Fuld

At the trial, the Art News Editor of the New York Times testified that he considered the sculptures or constructions to be works of art, more specifically, a form of "protest art" which (he added) was a long established type of art, exemplified by the works of such artists as Michaelangelo, Goya and Picasso. The defendant also testified, stating that, although the works express a political viewpoint, neither he, nor the artist intended to defile or cast contempt upon the flag. It was his belief, he asserted, that the artist, far from intending to do so, was seeking, rather, to convey the idea that others were contemning the flag by committing aggressive acts in its name.

The court, in affirming the conviction, places primary reliance upon *People* v. *Street* (20 N. Y. 2d 231, revd. on other grounds, 394 U.S. 576) in which we held that the State may legitimately circumscribe certain acts which are contemptuous of the flag. (See *People* v. *Street*, 24 N Y 2d 1026, 1028.) However, there is nothing in our opinion in that case which suggests that the mere fact that a person chooses to express himself by other than verbal means removes him entirely from the protections of the First Amendment. On the contrary, we wrote as follows (20 N Y 2d, at p. 235):

> "It is the teaching of the cases that the constitutional guarantee of free speech covers the substance rather than the form of communication and that the right to employ a particular mode of expression will be vindicated only if it has been outlawed not because of any

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sent the flag, colors, standard, shield or ensign of the United States of America * * *.

"This subdivision shall not * * * be construed to apply to a[n] * * * ornamental picture * * * on * * * which shall be printed, painted or placed, said flag, standard, color, shield or ensign disconnected and apart from any advertisement."

> legitimate State interest, but solely for the purpose of censoring the underlying idea or thought."

In other words, in the absence of a showing that the public health, safety or the well being of the community is threatened, the State may not act to suppress symbolic speech or conduct having a clearly communicative aspect, no matter how obnoxious it may be to the prevailing views of the majority. (See, e.g., *Tinker* v. *Des Manes*, 393 U.S. 503, 505, 509; see, also, Note, 68 Col. L. Rev. 1091; cf. *Cowgill* v. *California*, —— U.S. ——, 38 USLW 3266 [decided Jan. 19, 1970], *per* Harlan, J., concurring in dismissal of appeal.)

Quite obviously, the act which was prosecuted in the *Street* case—the public burning of a flag on a street corner in the Bedford-Stuyvesant section of Brooklyn—posed a threat to public order which the State could legitimately act to prevent. Indeed, we likened the public mutilation of a flag to "shouting epithets at passing pedestrians" (20 N Y 2d, at p. 237), a situation patently fraught with danger to the public peace. The same may not, however, be said of the art forms which the defendant before us displayed in the quiet surroundings of his upstairs art gallery on Madison Avenue in midtown Manhattan. In our modern age, the medium is very often the message, and the State may not legitimately punish that which would be constitutionally protected if spoken or drawn simply because the idea has been expressed, instead, through the medium of sculpture.

Unlike the situation in the recent case of *Cowgill* v. *California* (—— U.S. ——, 38 USLW 3266, *supra*),[2] the

[2] In *Cowgill*, where there was no showing that the use of a cut-up, mutilated American flag was motivated by a desire to express a particular philosophy or point of view—where, in other words, the

artist in the present case unquestionably made use of the flag for the purpose of expressing his political philosophy or views, his dissatisfaction with, and opposition to, the Vietnam War and other activities carried on by the Government. The challenged "constructions" were, in effect, but three-dimensional political cartoons. It is quite true that one's political motives may not be relied upon to justify his participation in an activity which is otherwise illegal. But it is equally true that an activity which is otherwise innocent may not be treated as criminal solely because of its political content.

Subdivision 16 expressly exempts from prosecution the display of the flag in "ornamental pictures," and, presumably, this exemption would apply to other forms of art as well. It is evident that the only reason why these works of Morrel were singled out for prosecution was not because the flag was used in the sculptures but solely because of the particular political message which those sculptures were intended to convey. In a very real sense, therefore, it was not the artist's *act* of making use of the flag which is being punished but solely the protest or the political views he was seeking to express thereby.

I have spoken principally of the artist who made the constructions in question. There is even less justification for proceeding against the owner of the gallery in which the works were being exhibited for sale, particularly in view of the absence of any proof that he himself actually intended to defile or cast the flag in contempt. Although it is true that intent need not be an element of a crime—providing it is considered *malum prohibitum*—this is not

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display had no "recognizable communicative aspect"—the court held that no substantial First Amendment question was presented. (See *Cowgill* v. *California*, —— U.S. ——, 38 USLW 3266, *supra*.)

the case where the challenged conduct involves the expression of political views. The First Amendment is designed not merely to prevent prosecutions but to actively encourage and foster the free dissemination of ideas. Thus, even activity which is not, in itself, subject to the protection of the First Amendment may not be prosecuted in a manner which will have a chilling effect upon the free dissemination of ideas. (See, e.g., *Smith* v. *California*, 361 U.S. 147.)[3]

In sum, I do not understand how it may reasonably be said that the mere display of Morrel's constructions in an art gallery, distasteful though they may be, poses the type of threat to public order necessary to render such an act criminal. This prosecution, in my view, is nothing more than political censorship falling far outside our holding in *People* v. *Street*, and may not be constitutionally sustained.

The judgment appealed from should be reversed.

* * * * *

Judgment affirmed. Opinion by Gibson, J. All concur except Fuld, Ch. J., who dissents and votes to reverse in an opinion in which Burke, J., concurs.

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[3] In the *Smith* case (361 U.S. 47), the court held that a bookseller could not be prosecuted for the sale of obscene material unless he was shown to be aware of the contents of the books. The rationale behind that decision—that absolute liability for the dissemination of unprotected material would chill the distribution of legitimate works which were subject to constitutional protection—is, it seems, to me, equally applicable here.

Order of Appellate Term, Supreme Court, First Department

At an Appellate Term of the Supreme Court, First Department, held on the County Court House, Borough of Manhattan, City of New York, on the 13th day of June, 1968.

PRESENT:

HON. WILLIAM C. HECHT, JR. JP
HON. SAMUEL H. HOFSTADTER
HON. JACOB MARKOWITZ

Justices.

February—No. 20

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—vs.—

STEPHEN RADICH,

Defendant-Appellant.

An appeal having been taken to this court by defendant from a judgment of conviction of the Criminal Court of the City of New York, County of New York, after trial before Hons. Basel (dissenting), Strong and Comerford, on the 5th day of May 1967, upon the charge of violation of Penal Law, Section 1425, Subd. 16(d), and having been sentenced by Hons. Basel, Strong and Comerford on the 5th day of May, 1967, as follows:

$500.00 or 60 days Workhouse

Order of Appellate Term, Supreme Court, First Department

and the said appeal having been heard and due deliberation having been had thereon,

IT IS ORDERED AND ADJUDGED that the said judgment so appealed from be and the same is hereby affirmed.

Enter

W.C.H. Jr.
Justice Appellate Term
Supreme Court, First Department

Majority Opinion of Trial Court

STRONG, P.J.

The defendant, an art dealer, publicly exhibited for sale at his gallery from December 13, 1966 to January 17, 1967, thirteen three-dimensional objects called "constructions." One of these objects (People's Exhibit 2) was in the display window and consisted of an American flag stuffed and shaped in a form suggesting a human body hanging from a yellow noose around its neck. Among the twelve other "constructions" inside the gallery was one (People's Exhibits 3 and 4) in the form of a large cross with a bishop's mitre on the headpiece, the arms wrapped in ecclesiastical flags and an erect penis wrapped in an American flag protruding from the vertical standard. Other "constructions," all making use of the flag stuffed in various shapes, are described in the complaint herein and portrayed in the photographic exhibits.

This prosecution is brought under paragraphs (d) and (f) of subdivision 16 of Section 1425 of the Penal Law of the State of New York, originally enacted in 1903, which provides as follows:

> "16. Any person, who
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> • • •
>
> "d. Shall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words or act, or
>
> • • •
>
> "f. Shall publicly carry or display any emblem, placard or flag which casts contempt, either by word or act, upon the flag of the United States of America, or
>
> • • •

"Shall be deemed guilty of a misdemeanor;

• • •

"The words flag, standard, color, shield or ensign, as used in this subdivision or section, shall include any flag, standard, color, shield or ensign, or any picture or representation, of either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be, either of, said flag, standard, color, shield or ensign, of the United States of America, or of the state of New York, or a picture or a representation of either thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation may believe the same to represent the flag, colors, standard, shield or ensign of the United States of America, or of the state of New York.

"This subdivision shall not apply to any act expressly permitted by the statutes of the United States of America, or by the United States army and navy regulations, nor shall it be construed to apply to a certificate, diploma, warrant, or commission of appointment to office, ornamental picture, article of jewelry, stationery for use in private correspondence, or newspaper or periodical, on any of which shall be printed, painted or placed, said flag, standard, color, shield or ensign disconnected and apart from any advertisement."

The defendant moves after trial to dismiss the complaint on the ground that the facts as established do not constitute a violation of the statute and further that, in any case, the statute is unconstitutional for denial to the de-

fendant of free speech, equal protection of the laws, and, because of vagueness, due process of law. Factually, the defendant contends that the "constructions" are a form of sculpture of a kind known as "protest art" and that no contempt for the flag was intended either by the artist or by himself. With particular reference to the cross-form, he claims that it expresses opposition by the artist to what he considers church-condoned American aggressive warfare in Vietnam as symbolized by the flag-wrapped phallus.

We hold that these so-called "constructions" constitute a contemptuous use of the flag of the United States and that the defendant by exhibiting them to the public cast contempt upon it in violation of paragraph (d) of the statute under which this proceeding was instituted. It will not do for the defendant to say that paragraph (d) by itself does not contain an object. Subdivision 16 must be read as a whole, and it is clear that the intended object is contained in the next paragraph, lettered "e", in the words "any such flag, standard, color, shield or ensign." We do not find paragraph (f) to be applicable to the facts presented here.

We further hold that these so-called "constructions" are not within the protection of the exclusionary paragraph of the statute. "Sculpture," if such these objects be, is not expressly exempted, and we see no valid basis for construing an implied exemption for it on the ground urged by the defendant that, "pictures" being expressly excepted, the omission of "sculpture" was a legislative inadvertence. In any case, it is important to note that only pictures termed "ornamental" are exempted, and we are not prepared to find that the subjects of this prosecution are "ornamental" even by contemporary community standards. It seems clear to us that the legislative intent was to protect from

prosecution the printed, painted, or affixed use of the American flag solely for ornamental, as distinguished from advertising, purposes. There is nothing in the statutory language to indicate that the legislature was concerned with the application of the First Amendment. As to these "constructions," it is, therefore, in our opinion of no consequence whether or not the word "pictures" in the exclusionary paragraph be deemed to embrace sculptures.

Obviously this case raises constitutional questions of fundamental importance. As a trial court, we must especially recognize the presumption supporting the validity of duly enacted legislation. The People having no right of appeal from an acquittal, we should not strike down this staute in the absence of a clear and overwhelming showing that it violates one or another of the guarantees set forth in the Bill of Rights. We fail to find such a decisive showing of unconstitutionality.

We do not find the statute here to constitute class legislation clearly in violation of the equal protection clause of the Fourteenth Amendment. As we have pointed out above, the section does not discriminate between pictures generally and sculpture generally. Only "ornamental" pictures are excepted. The legislature did not intend to say that pictures desecrating the flag would be exempted as a basis for prosecution and that similar sculpture would not be so protected. Any contemptuous use of the flag comes within the purview of the statute, whether two-dimensional or three-dimensional. We find in this statute no arbitrary discriminatory classification.

We cannot find that the freedom of speech guarantee of the First Amendment includes a license to desecrate the flag. It is inconceivable to us that the authors of the Bill of Rights could have intended that the protection of the

First Amendment could or should be stretched so far. The language of the Circuit Court of Appeals in *United States* v. *Miller*, 367 Fed. 2d at 79 (cert. denied), a draft card burning prosecution, is apropos. The Court there said: "* * * sincere motivation or the labeling of even non-violent conduct as symbolic does not necessarily transform that conduct into speech protected by the First Amendment."

In the exercise of its police power, a State may restrict acts which pose an "immediate threat to public safety, peace or order" (*Cantwell* v. *Conn.*, 310 U.S. 296 at 308). In *Halter* v. *Nebraska*, 205 U.S. 34, 41, the Supreme Court, in upholding a statute similar to that involved here as applied to the use of the flag in advertising, said:

> "From the earliest period in the history of the human race, banners, standards and ensigns have been adopted as symbols of the power and history of the peoples who bore them. * * * Hence, it has often occurred that insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot."

It seems to us that the prohibited use of the flag in advertising is less of a desecration and therefore less of a threat to public order than the use and exhibition of it in the so-called "constructions" here involved.

The United States Supreme Court decisions, cited by the defendant, in *West Virginia* v. *Barnette*, 319 U.S. 624, *Stromberg* v. *California*, 283 U.S. 359, and *Terminiello* v. *Chicago*, 337 U.S. 1 (cf. *Feiner* v. *New York*, 340 U.S. 315), arose from such different facts and statutes that we do not find them determinative of the issue here involved. In any

case, we do not presume to make a final determination as to "where the individual's freedom ends and the State's power begins." The Supreme Court has said that our system places that duty upon it (*Thomas* v. *Collins*, 323 U.S. 516, 529).

In our opinion the language of the statute involved here is not so vague as to violate the due process clause of the Fourteenth Amendment. It seems to us clear enough to apprise any person of ordinary intelligence as to what it permits and what it prohibits. If he wishes to approach the brink of what is proscribed, he necessarily gambles on an adverse finding by the Court. Since we find the statute to constitute "*malum prohibitum*," no criminal intent to violate it is prerequisite to conviction. *People* v. *Boxer*, 24 N.Y.S.2d 628, 632.

Holding, as we do, that the act of the defendant in publicly exhibiting these so-called "constructions" cast contempt upon the flag of the United States and that no exception in the statute here involved exempted it and, further, that the statute as here applied does not clearly violate any constitutional provision, we find him guilty of the charge against him as set forth in paragraph (d) of subdivision 16 of Section 1425 of the Penal Law of the State of New York.

Comerford, J. concurs in this opinion.

Basel, J. dissents in his own opinion.

Dissenting Opinion of Judge Basel

Defendant Radich is charged with a misdemeanor by reason of exhibiting and offering for sale in his art gallery a form of sculpture called "constructions" designed of American flags in forms described in the majority opinion. Defendant's gallery is well established in the New York art world. The exhibition was reviewed by art critics including the critic for The New York Times and was treated as a serious artistic offering. The works complained of, when displayed, were accompanied by a musical background of taped anti-war songs. The sound must be considered part of the exhibit. Modern artists often use additional media to accompany their visual creations to express their ideas more completely and to create a total effect. It is in the context of the anti-war theme, the statement the artist attempts to make must be judged. Defendant describes his efforts as "protest art." The creator of this work specifically protests America's participation and leadership in the Vietnam war.

There are many Americans in opposition to the war, who revere the flag and to whom, "it signifies government resting on the consent of the governed, liberty regulated by law, the protection of the weak against the strong, security against the exercise of arbitrary power and absolute safety for free institutions against foreign aggression." *Halter* v. *Nebraska*, 205 U.S. 34, 43. These loyal dissenters vehemently, honestly and passionately oppose U.S. intervention in Vietnam. They have devised varied means to express their opposition. This group argues, and many are veterans who fought to protect the flag, that the flag is being placed in contempt by our "aggression" and persistence in this war. They protest that the image of the American flag as a symbol of freedom to lovers of liberty

and a shining object to the oppressed is cast in contempt. This is the message the artist seeks to convey, in the work defendant exhibited. We may quarrel with his theme, disagree with his method, condemn his goal. We cannot dispute his right to express dissent even though the means be loathsome to us. " . . . laws must, to be consistent with the First Amendment, permit the widest toleration of conflicting viewpoints consistent with a society of free men." *Board of Education* v. *Barnette*, 319 U.S. 624, p. 644. We can also not ignore the fact that large groups of Americans agree with his dissent, as witness the recent march of 100,000 upon the U.N. " . . . freedom to differ is not limited to the things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." *Board of Education* v. *Barnette*, *supra*, p. 642.

It is not the dissent for which defendant is prosecuted, we are told, it is the method that is condemned. It is the fact that the artist whose work defendant exhibits has chosen as his means of expression, to defile the flag by hanging it in effigy, draping it in chains, shaping it as a phallus on a cross, this opposition may no longer be characterized as free expression, it is contemptuous conduct. The sculptor cannot declare his dissent in this form, it is argued, because it violates and shames the symbol of our land and is thus a crime as defined in Penal Law Sec. 1425, Subdivision 16(d) and (f).

Defendant contends artist is not showing contempt for the flag. He supports what it symbolizes, liberty, equality, freedom, but he protests by means of these "constructions" that those virtues have been abandoned by United States conduct in Vietnam. The ideals the flag represents, he

argues, are enchained, its inspiration publicly hangs in shame before the world, and the church and state are jointly to be charged as violators of the innocent. He makes that protest visible, it takes sculptural form.

It is essential that legislation which is criminal in character be clearly drawn and precise so that those enforcing it will know its meaning and those subject to it can clearly regulate their conduct. If such legislation has a tendency to impair or impede free speech it must be judged ultra carefully. *Winters* v. *New York*, 333 U.S. 507, 509; *Stromberg* v. *California*, 283 U.S. 359; *Herndon* v. *Lowry*, 301 U.S. 242. As Judge Learned Hand said in *Masses Publishing Co.* v. *Patten*, 244 Fed. 535, 540: "Assuming that the power to express such opinion, (hostile criticism) may rest in Congress in the throes of a struggle for the very existence of the state, its exercise is so contrary to the use and wont of our people that only the *clearest* expression of such a power justifies the conclusion it was intended." Section 1425, subdivision 16(d) reads in full: "Shall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words, or act." It does not describe the object of this condemnation. Although a reading of the full statute (all of Section 1425, subdivision 16 might suggest it was a flag that was the legislature's concern, "16(d)" does not say sc and it is the only subsection in 1425 (16) which omits the word "flag." It would be novel criminal law to convict anyone under such a statute, to read the word flag into it in order to obtain a conviction is in my view clearly unconstitutional.

The prosecution and the question is thus narrowed and confined to the validity of subsection 16(f) "shall publicly carry or display any emblem, placard or flag which casts contempt, either by word or act upon the flag of the United States of America."

Who shall be the judge of what *word* or *act* is contemptuous? Which *act*, what *words* constitute contempt?

"The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement. The crime must be defined with appropriate definiteness." *Cantwell* v. *Conn.*, 310 U.S. 296; *Pierce* v. *U. S.*, 314 U.S. 306, 311. "There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of an enactment . . ."

Winters v. *N. Y.*, 333 U.S. 507, 518. *U. S.* v. *Cohen Grocery Co.*, 255 U.S. 81.

In *Herndon* v. *Lowry*, supra, p. 263, the Supreme Court said: "The statute, as construed and applied, amounts merely to a dragnet which may enmesh anyone who agitates for a change of government if a jury can be persuaded that he ought to have foreseen his words would have some effect in the future conduct of others. No reasonably ascertainable standard of guilt is prescribed. So vague and indeterminate are the boundaries thus set to the freedom of speech and assembly that the law necessarily violates the guarantees of liberty embodied in the Fourteenth Amendment." See also *People* v. *Bookcase, Inc.*, 14 N.Y. (2) 409, *People* v. *Kahan*, 15 N.Y. (2) 311.

The statute in the instant case is drawn so broadly and is so vague that any words or any acts to which someone in authority takes offense can be deemed criminal. " . . . the constitutionality of a statute governing publications is to be tested by what *can* be done under it and not by the *particular* violation which is charged with having occurred." *People* v. *Bookcase*, supra, p. 418. The 100,000 who marched upon the U.N. are critical of the uses to which the flag is being put in Vietnam, as are Senator Fulbright, Senator

Hatfield and thousands of others. Are they guilty of crime if they *say* the flag has been placed in chains by United States conduct? No one would seriously argue they be jailed for expressing verbally or in writing what the artist here makes visual. I agree with defendant's art expert that the artist's talent is limited, his symbolism obvious, cliche and lacking in imagination. I acknowledge he has chosen a means of expression in extreme poor taste and shabby in form. But is he to be punished for his lack of manners and his vulgarity when his intention is a serious condemnation of our present foreign policy? Who is to judge under this statute if what he did is unlawful? If those who marched in opposition are his judges, it is doubtful they will find his conduct contemptuous. If those who hurled insults at the parade were on his jury, they would almost certainly find him guilty. "A person gets from a symbol the meaning he puts into it." *Board of Education* v. *Barnette*, supra, p. 633. "It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against." *U. S.* v. *Cohen Grocery Co.*, supra, p. 89. The legislature has established standards so vague, indefinite, imprecise and subjective, the statute under discussion should be held unconstiutional. As Chief Justice Hughes said in *Stromberg* v. *California*, supra, p. 369, "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means . . . is a fundamental principle of our constitutional system. A statute which upon its face . . . is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment."

Dissenting Opinion of Judge Basel

Halter v. *Nebraska*, supra, relied upon by the People and the majority opinion and followed in *People* v. *Picking*, 288 N.Y. 144, is distinguishable. In a recent case involving disrespect for the flag, in Federal District Court, Southern District, although the court did not take jurisdiction for procedural reasons, it said: " . . . the substantive constitutional issues are not insubstantial. This view can scarcely be altered by *Halter* which was decided several years before the protections of the First Amendment were held firmly applicable to the states through the Fourteenth Amendment. However, the argument that the statute is unconstitutional for vagueness was notably absent in the *Halter* case." P. 7. *Dunncombe* v. *State of N. Y.*, U.S. DC So. Dist. N.Y. 67, Civ. 1085 April 11, 1967, Bryan, J. *Halter* also passed only on the advertising provisions of Section 1425. These are more carefully drawn than 1425, 16(d) and (f), and are more detailed and not vague. *Halter* is further distinguished by the fact that advertising is not yet protected by the First Amendment.

The other argument advanced by defendant, that the statute intends to exempt all forms of expression as protected by the First Amendment and that all sculpture as well as all painting is included in the descriptive term in the statute, "ornamental painting," does not require discussion in view of the opinion here expressed as to the unconstitutionality of the statute.

The motion to dismiss should have been granted and the defendant found not guilty. I dissent from the majority view.

Transcript of Proceedings in Trial

CRIMINAL COURT
OF THE CITY OF NEW YORK

PART 2B[3], COUNTY OF NEW YORK

Docket: B 196

Charge: 1425 P.L.

PEOPLE OF THE STATE OF NEW YORK,
on the Complaint of
PATROLMAN JOHN P. BURNS,

—VS—

STEPHEN RADICH,

Defendant.

March 29, 1967

BEFORE:

HON. AMOS S. BASIL,
" FREDERICK L. STRONG,
" JAMES J. COMERFORD,

Judges

APPEARANCES:

FOR THE PEOPLE:

GERALD SLATER
Assistant District Attorney
New York County

FOR THE DEFENDANT:

RICHARD G. GREEN
1270 Avenue of the Americas
New York, New York

ALSO PRESENT:

SHIRLEY FINGERHOOD

COURT OFFICER:

MICHAEL JAY KUGLER
Official Court Reporter

[2] Court Officer: 35, Docket B 196, Stephen Radich, violation 1425 of the Penal Law, subdivision B and F, on the complaint of Patrolman Burns, 19th Precinct. Defendant represented by counsel.

Mr. Green: Richard G. Green and Shirley Fingerhood, 1270 Avenue of the Americas, for the defendant.

Mr. Slater: People ready.

Court Officer: Defendant ready?

Mr. Green: The defendant is ready.

Court Officer: First witness, step up, please.

Judge Basel: Do you swear the testimony you are about to give in this case will be the truth, the whole truth and nothing but the truth, so help you God?

Officer Burns: I do.

PATROLMAN JOHN P. BURNS, having first been duly sworn, testified as follows:

[3] Court Officer: Give your name, shield and assignment, Patrolman.

A. Patrolman John P. Burns, 21038, 19th Precinct.

Mr. Green: Excuse me, if the Court wishes, I would like to submit a memorandum at this point. I have it in triplicate for the Court.

Mr. Slater: I just want to state, your Honor, this is the first time I have seen this memorandum.

Direct Examination by Mr. Slater:

Q. Officer Burns, on December 27th, 1966, at about 8:30 A.M., were you on duty? A. I was.

Q. At that time were you in uniform? A. I was.

Q. Were you in the vicinity of premises 818 Madison Avenue, City, State, County of New York? A. I was.

Q. Did you make any observations? A. Yes, I did.

[4] Q. What did you observe? A. On the second floor of a four story building I observed in the window what appeared to be the flag of the United States Government in a shape of a human body, hanging from a yellow noose.

Judge Strong: What?

A. It was hanging from a yellow noose, your Honor.

Q. Did you see any thing else in this window? A. Not at the time, no.

Q. Did you return to this area the following day, this is, on December 28th, 1966, is that correct? A. I did.

Q. About what time was this when you returned? A. In the evening, about 5:00 o'clock.

Q. When you returned, did you go into the premises? A. I did.

Q. What occurred there? A. I entered the premises with another member of the force, Patrolman Myrich, I believe, from the photo unit, and I had with me a Court summons which I had obtained from the previous day from 52 Chambers Street. [5] As I entered the premises ion the second floor I observed the defendant, Mr. Radich, in conversation with an unknown female. I identified myself to Mr. Radich and I asked him if he was the artist stipulated on the entrance of the building, marked Merrell. He told me he was not, that his name was Stephen Radich, that he was the proprietor of the gallery. I told him I observed the violation of 1425 of the Penal Law, and I served a Court summons upon him.

Q. Did you have any other conversation with the defendant at this time? A. Yes. I believe I asked him—

Q. Do you understand, Officer? A. Yes. I asked him

if the artist marked Merrell was about and he said he was not. And I asked him if he anticipated his arrival, and he said he wasn't sure, that he came in intermittently. And I asked him if these objects of art were for sale. He said there was no price for them, any benefit derived from them he would share in the profits.

Q. Did the defendant say anything else? A. I told him we would take photos of the displays [6] and he didn't object, and that's all the conversation we had.

Q. Were photos taken on December 28th, 1966 in these premises? A. Yes, they were.

Q. Officer, I ask you to look at this picture. Please indicate when you've examined it to your satisfaction. A. All right.

Q. Officer, is this photograph a fair and accurate representation of the condition of the premises 818 Madison Avenue, Manhattan, as you observed it on December 27th and 28th, 1966? A. Yes, it is.

Q. I ask this photograph be received at this time as People's Exhibit 1. I am showing same to counsel for the defendant.

Mr. Green: No objection.

Judge Strong: Counselor, will you approach the bench.

Q. Officer, I ask you to examine this second photograph. Please indicate when you've examined it [7] to your satisfaction. A. All right, I've examined it.

Q. This photograph, is it a fair and accurate representation of an object which you say you saw in the premises 818 Madison Avenue on December 28th, 1966 while in the premises of this defendant? A. Yes, it is.

Mr. Slater: I ask at this time that this photograph be received in evidence as People's 2 in Evidence, showing same to counsel for defendant.

Mr. Green: No objection.

Q. I ask you to examine this third photograph, Officer. Please indicate when you've examined it to your satisfaction. A. I've examined it.

Q. Officer, is this photograph a fair and accurate representation of an object you saw in 818 Madison Avenue on December 28th, 1966 in the presence of this defendant? A. Yes, it is.

Mr. Slater: I ask this photograph [8] be received People's 3 in Evidence. I am showing same to counsel for the defendant.

Mr. Green: No objection. I think People's 3 is two exhibits, isn't it?

Q. Now, Officer, I ask you to examine this photograph, please, and indicate when you've examined it to your satisfaction. A. I've examined it.

Q. Is this photograph a fair and accurate representation of an object which you saw in the premises 818 Madison Avenue on December 28th, 1966, when the defendant was present? A. Yes, it is.

Mr. Slater: I ask this photograph be received as People's 4 in Evidence. I am showing same to counsel for the defendant.

Mr. Green: No objection.

Q. I show you this photograph, please, and indicate when you've examined it to your satisfaction. A. I've examined it.

John P. Burns—for Plaintiff—Direct

Q. Is this photograph a fair and accurate [9] representation of an object which you saw in the premises 818 Madison Avenue on December 28th, 1966, in the presence of this defendant? A. Yes, it is.

Mr. Slater: I ask this photograph be received as People's 5 in Evidence, and showing same to counsel.

Mr. Green: No objection.

Q. I ask you to examine this photograph, Officer. Please tell the Court when you've examined it to your satisfaction. A. I've examined it.

Q. Officer, does this photograph represent a fair and accurate representation of an object you saw in the premises 818 Madison Avenue on December 28th, 1966, in the presence of this defendant? A. Yes.

Mr. Slater: I ask this photograph be received as People's 6 in Evidence, showing same to counsel for the defendant.

Mr. Green: No objection.

[10] Q. Officer, I ask you to examine this photograph and tell the Court when you've examined it to your satisfaction. A. I've examined it.

Q. Is this photograph a fair and accurate representation of an object you observed in the premises 818 Madison Avenue on December 28th, 1966, in the presence of this defendant? A. Yes.

Mr. Slater: I ask this photograph be received as People's 7 in Evidence and showing same to counsel for the defendant.

Mr. Green: No objection.

Q. Officer, I ask you to examine this photograph, please, and indicate to the Court when you've examined it to your satisfaction. A. I have.

Q. Is this photograph a fair and accurate representation of an object which you observed in the premises 818 Madison Avenue on December 28th, 1966, in front of this defendant? A. Yes, it is.

[11] Mr. Slater: I ask this photograph be received in evidence as People's 8, and showing same to counsel for the defendant.

Mr. Green: No objection.

Q. Now, Officer, I ask you to examine this photograph, please, and indicate to the Court when you've examined it to your satisfaction. A. I've examined it.

Q. Is this photograph a fair and accurate representation of an object which you observed at 818 Madison Avenue on December 28th, 1966, in the presence of the defendant? A. Yes, it is.

Mr. Slater: I ask this photograph be received as People's 9 in Evidence, and showing same to counsel for the defendant.

Mr. Green: No objection.

Q. Officer, on December 28th, when you were in the premises 818 Madison Avenue, in addition to the defendant and the officer whom you mentioned earlier, were there any other persons in the gallery? [12] A. Yes, there were.

Q. How many other persons? A. There was a member of Bureau of Special Service, a detective whose name I

do not recall. There was a sergeant from the 19th Precinct, Sergeant Cavanaugh, and while we were there one other person came in, an unknown female. That's all I saw.

Q. Officer, how did you gain access to the studio itself? A. The door was open. We just walked in.

Q. Did you ride an elevator or did you go upstairs? A. We entered from the main floor and walked up stairs into the second floor door, which was open.

Q. Was there anything that blocked your entrance in any way? A. No, sir.

Q. Was there any admission charge? A. No, sir.

Mr. Slater: You may inquire.

Cross Examination by Mr. Green:

[13] Q. Officer, I believe you testified that when you stood in the street on the evening of December 27th you saw this flag wrapped like a figure, hanging in the window? A. Yes.

Q. And that was all you did see? A. Yes, sir.

Q. Wasn't the name of the gallery clearly visible? A. Yes, the Stephen Radich Gallery.

Q. There was no mistake, this was the Stephen Radich Gallery? A. No, sir.

Q. Now, how many of these figures that had been introduced in evidence here, eight photos, how many figures were in this exhibit? A. I believe I counted 13. I couldn't be sure, 12 or 13.

Q. Were pictures taken of the others? A. No, sir.

Q. Only of these? A. Yes.

[14] Q. What were the other figures made of? A. I don't know what they were made of, cloth, some cloth.

John P. Burns—for Plaintiff—Cross

Judge Strong: They did not involve the flag, is that it?

A. No, not the flag of the United States Government.

Judge Basel: How many flags did not represent the flag of the United States?

A. The ones we didn't take a picture of.

Judge Basel: How many is that?

A. Seven or eight. Some of them may be duplicates.
Q. There are some that show the same?

Judge Strong: Two that show the same figure.

Q. Now I show you here People's—withdrawn. In looking at these figures, could you tell us which of them actually used the American flag itself and which may have used fabric that looked like the American flag? A. Could you be more specific, sir?
Q. I'll let you look at them, sir.

Mr. Slater: I'll object to the form of the question.
[15] Judge Strong: Objection sustained.

Q. Will you look at those pictures, please, and tell us which of them used actual American flags as you saw them.

Judge Strong: Do you mean flags that were previously made up, pure flags, instead of being made up by the artist?
Mr. Green: That's right, sir.

Mr. Slater: I object to that question. I don't think the witness is qualified.

Judge Strong: If you can tell.

A. I couldn't tell you, your Honor.

Q. You don't know which were flags and which were not flags?

Mr. Slater: I object to the question.

A. Complete flags?

Judge Comerford: Do you understtand these questions, Officer, as put to you by the counsel?

A. Not really.

Judge Comerford: The Court is concerned about these things. Will you be a little more specific?

Mr. Green: I'll be glad to.

Judge Comerford: Things are made out of fabric including the United States flag.

Judge Strong: Anyone could make one.

Q. Could you tell me by looking at these pictures which of them look to you like flags and which of them you felt were actually flags? A. Could I answer one question at a time?

Q. Yes. A. These appear to be flags of the United States Government.

Q. Would you identify them by their number, please? A. No. 9, No. 7, flags or portions thereof of the flag, No. 8, No. 5, No. 4, No. 3, No. 2, No. 1.

Judge Strong: That is all of [17] them, is that right?

A. No, your Honor, there is one that did not appear to be a flag of the United States of America.

Mr. Strong: Which number is that? A. This is No. 6.

Q. But you included that one in your complaint, is that correct? A. Yes.

Q. Is there something in there that looked like the flag? A. It looks like the president of the United States to me.

Q. That is not the flag? A. No.

Q. Do you know how many copies there are actually, how many models of the president of the United States there are? A. No.

Mr. Slater: I object. That is not an issue here.

Mr. Green: I asked if he [18] knew, your Honor.

Judge Strong: The answer is no.

Mr. Green: I think the Court may take judicial notice there is only one emblem of the president, and that is guarded by the Secret Service and carried by them wherever the President is.

Judge Strong: That is not judicial.

Mr. Slater: I agree with counsel. It is, since it's readily ascertainable.

Q. I show you here a magazine, Life Magazine, dated March 31st, 1967. I call your attention specifically to page 18 and 19 of that magazine, and I ask you if the figures represented there is the figure that you saw in the defendant's art gallery?

Mr. Slater: I object to the form of the question, there not being a proper foundation laid.

Judge Strong: Repeat the question, Mr. Reporter.

[19] (Reporter read back the question.)

Judge Strong: Overruled.

A. I see nothing on page 18, your Honor, but on page 19 there is a photo which resembles photo No. 2.

Q. Would you say that is a fair and accurate representation of the figure you identified in Exhibit #2? A. Yes, sir.

Mr. Green: I offer that in evidence, Defendant's Exhibit A.

Mr. Slater: No objection, you Honor.

Judge Strong: Received as Defendant's Exhibit A.

Q. Had you seen that issue of Life Magazine before I presented it to you? A. No, sir. Could I qualify that last answer? I didn't see that picture. I did see the front cover of that book though.

Judge Strong: Proceed.

Q. I call you attention to page 22 of Defendant's Exhibit A, and particularly to the illustration [20] in the lower right-hand corner. Does anything in that picture look to you like the flag of the United States of America?

Mr. Slater: I object to that question since that photograph is not in evidence. We merely received a photograph that was on page 18 and 19, and it would not be proper for this witness to testify.

John P. Burns—for Plaintiff—Cross

Mr. Green: I offer the entire issue of the magazine in evidence, if your Honor please, it bears on our point in this case.

Mr. Slater: I object.

Miss Fingerhood: That there is an improper discrimination as sculptures or paintings which may be hung, but sculptures may not, as the statute reads. I'll get into that later on, but it appears on that point.

Judge Comerford: What connection is that, what you say, and this exhibit?

Mr. Green: What I am saying is we were offering the entire magazine. [21] We claim there is unequal treatment under the law.

Judge Comerford: Don't try the case from there. Tell us what the connection is between what is proper and necessary to put in evidence and the question you're asking the officer. Listen, please. What information are you trying to convey to the Court?

Mr. Green: The statutes specifically refer to an impression of the flag. In the opinion of the onlooker, the statute uses that language. We didn't put it there.

Judge Comerford: What does that have to do with Life Magazine?

Mr. Green: What I am saying is this: I am going to show this Court that there are various uses of the flag, that in prohibiting a use in sculpture there is even unconstitutional prohibition of this defendant to exhibit sculpture, exhibiting a painting or using it in a magazine as an illustration. The statute is not meant to include these.

The [22] statute isn't to protect the statute. Any kind of use for an expression, in other words, there is an exception in the statute.

Judge Strong: Objection overruled.

Mr. Slater: Your Honor, I wish to be heard. The magazine is replete with hearsay. The article was written by someone who was not here in Court.

Mr. Green: I'll limit it to the illustrations in the issue, not the text.

Mr. Slater: I request counsel to separately introduce each photograph in evidence.

Mr. Green: Your Honor, do you want me to do it or refer to the page? I am going to introduce every photograph in this article except the one on page 18.

Judge Comerford: Just one minute, counselor.

Mr. Slater: Your Honor, I stated earlier that the text itself is heresay. [23] The People request that these photographs be introduced, that they be introduced individually, and I wish to state that photographs are a mere substitution of something which cannot for one reason or another be brought into Court, and the proper way to introduce these photographs is to ask the witness whether these photograps are a fair and accurate representation of a) an object or condition which existed at the time in issue.

Judge Strong: These photographs are things that the officer did not see, so how could he say they are a fair representation?

Mr. Slater: Only the first photograph that was introduced into evidence has been testified to was a fair and accurate representation that he saw on

December 28th, 1966. That is why I had no objection.

Judge Strong: That has already been received.

Mr. Green: We are introducing [24] the photographs not as evidence of an objective fact that the witness has seen. We are introducing the photographs. The statute doesn't cover every expression of opinion or thought in its substance written in the statute or that there is unconstitutional descriptions. There are certain forms that are permitted and others are not. Defendant's Exhibit A is a photograph connected with this article, and I could name them all. They could be called A1, 2 and 3, or 3B, treated as one article connected with this photograph except the one on page 18, the only one there, and the one on page 66, the only one there. All the rest are offered as part of our Exhibit A. Now I can enumerate in more specific detail if the Court wishes.

Judge Strong: What does the article state?

Mr. Green: A test case for Old Glory, stuffed sculpture described, abuses of the flag.

Judge Comerford: Are any one of [25] these pictures appearing in Life, what date?

Mr. Green: The date of the issue is March 31st.

Judge Comerford: Which is Defendant's Exhibit A? Are any one of them reproducing a picture of the situation that existed on this man's premises on the complaint?

Judge Strong: Exhibit A does.

Mr. Green: Our point with respect to the other pictures, your Honor, is not to represent the premises of the defendant nor to represent the figures

that he was exhibiting. It is to bring out that this kind of use is a use that exists today in New York and in this country, that this is permitted under the statute expressly, and that the use of sculpture, the use of the flag and these figures are permitted under the flag. In this magazine the use of the flag as sculpture is also permitted under this magazine under the exception that is here for paintings. In other words the statute, your Honor, has an exception. [26] It says this statute does not apply to, among other things, I excluded referring to this issue, not apply to certificates, diplomas, warrants, commission of appointments to officers and now I come to it, an ornamental picture, an article of jewelry, stationery for private use or correspondence or newspaper or periodical printed, painted or placed said flag, colored shield or ensign disconnected or part of any advertisement. It is our contention here there are two points involved here. One is that sculpture was not specified as such as ornamental pictures. It did not mean the legislature meant to exclude sculpture from the statute, just as I think your Honor will note it doesn't say a book, except it says newspapers or periodicals. I don't think anyone would seriously contend you could take these pictures, put them in a book and they would lack the protection of the statute. So with that, what we are saying first, the exception in the statute, although it doesn't mention [27] sculpture, does include it. The other point which these things are pertinent—

Judge Comerford: Counselor, do you wish to take the stand and be a witness?

Mr. Green: I am not testifying.

Judge Comerford: You're doing the equivalent of it and without being sworn.

Mr. Green: I accept.

Judge Basel: The question here is whether sculpture is covered under this statute.

Mr. Green: I respectfully apologize if I did not make myself clear, but what I am saying is there is an exception in the statute for certain things, pictures, and what I am saying—

Judge Basel: And you're saying it should include sculpture?

Mr. Green: Yes. What I want in the record is the fact there is an exception, and if this exception is not uncertainly [28] applied then the statute improperly discriminates.

Judge Basel: That is your argument. What relevance does this have?

Mr. Green: These things are not subject to prosecution, but the same thing, if it's in a round form, is.

Judge Strong: Just because they appear in Life doesn't mean—

Mr. Green: It says newspaper or periodical.

Mr. Slater: Your Honors, may I be heard?

Judge Strong: Your objection is sustained.

Mr. Green: I'll take exception, please.

Q. I believe you mentioned a conversation with the defendant, and in your conversation you said that the defendant told you there was, you talked to the defendant about the price of these works. Exclusively what was said, as well as you remember? [29] A. In view of the fact I didn't see any price tags on them, I asked if they were for sale.

Q. What did he say? A. He said there was no set figure amount for them but the people who would want to pay for them, they would offer something to the artist and he would share.

Q. You asked him if they were for sale and he gave you that answer you gave us? A. I said I asked him if there was a price tag on them and he said there was no specific tag.

Q. Did you ask him if they were for sale? A. He said there was no specific sale.

Q. He didn't answer yes or no, did he? A. No, he didn't say yes or no.

Judge Strong: He did say something about sharing in the profits?

A. Yes, he did, your Honor.

Mr. Green: No further questions.

Mr. Slater: That is the People's case, your Honor.

Mr. Green: May it please [30] the Court at this point, I move to dismiss at the close of the People's case. I most to dismiss first because neither the complaint nor the evidence that has been offered in support of it states any crime. The statute, we will come back to the point we were discussing, with reference to the exhibit, expressly says, "This subdivision shall not apply to any thing permitted by the statute of the United States of America, etc., nor shall it be construed to comply to a certificate, a diploma, a warrant, a commission, an ornamental picture, an article of jewelry, stationery for private use, correspondence or newspaper or periodical or

any of which shall be printed, painted or place said flag, standard, etc." It is our contention, your Honor, that the whole question of constitutionality of the statute does not have to be faced. It's our contention the legislation had in mind when it made an exception for newspapers and periodicals clearly had in mind the first amendment, the right to free speech, [31] the right to criticize, criticize in whatever form they may be doing, and in so doing specifically exhibiting magazines, periodicals, pictures from the damnation, shall be say, and the statute meant to protect, and the legislation had this in mind.

Judge Strong: Don't you think these photographs that have been received in evidence, People's exhibits, they are pictures, would you call them ornamental pictures, which are exhibited?

Mr. Green: Yes, your Honor. Under the statute those pictures could be hung on the wall in a public place and there would be no violation of the statute.

Judge Stronge: Because you call them ornamental pictures?

Mr. Green: Yes, under the statute.

Judge Strong: It's what you mean, ornamental.

Mr. Green: Let's put it more [32] directly. You could take that magazine, hang it on a wall. It appeared on a magazine. The magazine is exempt. What I say on this point, your Honor, as far as this being exempt under the statute, this is the statute, for this doesn't exempt books, it exempts newspapers and periodicals. Now you really don't believe that anyone would argue any book using pictures of a flag or sculptures could be prosecuted under this statute when there is something for newspapers and

periodicals in this statute. What we say on this point, first the legislature meant an exception here for all expressions, whether of opinion or artistic expression, and it put it in, and the statute is artful in many ways, the fact that it omitted specifically to mention sculpture but it mentions an ornamental picture.

Judge Comerford: Counsel, before you proceed any further, so I may not be interrupting your thoughts, did the statute exempt or does it exempt or does the legislature exempt [33] the displaying of a second floor front window in a public street in New York City, the use of the flag in the form of a male sexual organ protruding in the interior portion of the body depicting there the male penis. Does the statute permit that to represent an erected penis in a public place, public street?

Mr. Green: I would say to you—

Judge Comerford: Yes or no?

Mr. Green: You ask a question that is a false exception.

Judge Comerford: These are the facts in the complaint.

Mr. Green: My answer would be yes, that was not the figure that was in the window, and this is not, I might add, your Honor, a prosecution of any obscenity statute. The question is not based on the evidence, if I may respectfully says so, and I would say also that if this were a picture, a photograph, even if it was described by you, [34] the statute would exempt it.

Judge Comerford: I want to know your viewpoint and you have so expressed it.

Motion to Dismiss

Mr. Green: I must emphasize to the Court, to your Honor, there is no prosecution for obscenity. He is not charged with violation of any statute having to do with obscenity. Now, going on, we say then first that on omission of the word sculpture, whether it is excluded in the words ornamental picture or the omission of the word book, where you excluded newspapers and periodicals, is not something that they don't have the protection of the exception under this statute. Going on from there, however, I would say the only exceptions here are for periodicals and exceptions for articles of jewelry, for ornamental pictures, not for sculpture and books. Then I would say the statute denies this defendant the equal protection of the laws and is invalid under the Constitution of the United States and of the New York State Constitution. Classification [35] in statutes have to be reasonable. The legislature may classify certain things, and if its classifications are reasonable, they can be upheld, but it is very difficult to seek any justification to applying this statute to a person who exhibits sculpture, but it doesn't apply to the same man who exhibits paintings, yet if you say the statute does not have an exception for sculpture, that is what you're saying. Now, at the heart of all of this, however, subdivision 16 of 1425 is unconstitutional in that it denies the defendant freedom of speech, freedom of expression under the first amendment to the Constitution of the United States either on its face or to this defendant. The flag as applied is a symbol, so the Courts have held. The United States Supreme Court, in the Barnett case, has held

that the legislature could not compel respect for the flag in the form of a salute, it could not make anybody respect the flag. The case of Whitney against California similarly held in a flag case but that an [36] expression of opinion could not be expressed. Now, whether a painting or sculpture be considered as protest art or abstract art, the creators of sculptures and writers are protected under the First Amendment. The movies are protected to the limit and extent they do not violate an obscenity statute, and we have no obscenity statute prosecution here. We say the use of the flags in these sculptures are a form of expression. The Board of Education against Barnett, which was a salute, the Court said, "It is a primitive way of communicating ideas." Now the Court there held that the statute could not compel anybody to respect the flag by saluting it. The question in the Barnett case, what is the interest which the statute is trying to protect through the flag salute, and then the next question is that interest, one, that constitutionally the statute may protect, and the Court said, compelling respect for the flag, compelling, in other words, good thinking as against bad thinking, or good expression [37] against bad expression, something the statute could not do, and therefore it held, in the flag, in the salute case, it states cannot do this, the defendants could not be punished in any way for the refusal to salute the flag. Now what is the state trying to do here? The state is trying to do exactly that. It's trying to prevent the flag from being treated with disrespect. It's not whether you and I disagree with expression. The issue here is whether

this is First Amendment, symbolic speech under the First Amendment, so what is the state doing here? It's saying you must not hold the flag up to contempt by word or act. What kind of act? The act is the expression of contempt, it's the same as the word. Now the flag is a symbol for the United States. I don't think anybody in this day would argue that an individual couldn't get up and take his government apart or its policies, or government or policies, or the President of the United States or its policies. The flag is the symbol of the [38] government of the United States, and what this statute attempts to do when we say illegally is to prevent the expression of opinion, the expression of thought, and the statute cannot do that under the First Amendment. I would like to make one point. The ban against censorship, the First Amendment, it's not for the expression which is generally acceptable to all of us. What it's protecting is speech we don't like. As the Court said in the Barnett case, "freedom to differ is not limited to things that do not matter much that would be a more shadow of freedom." The test of its substance is the right to differ as to things that touch the heart of the existing order. Similarly, in the Stromberg case again a kind of flag case, there was a California statute that said that you couldn't use a red flag at public gatherings because this expressed contempt for the United States of America and its Constitution. The use by Chief Justice Hughes from our own statute [39] said the State of California can't do that, you can't compel respect for government. If they want to speak against the thing, they do so.

We are not arguing here the question of advertising, use for advertising purposes. This is not an issue here, and I might say the only New York case which held the constitutionality in the Court of Appeals was a case involving the flag for advertising purposes. That is not the purpose here. It was an ad for travel agencies in that case. What we say here is any expression by word, painting or sculpture, any artistic work, whether it is abstract or protest work, obviously things of that nature are something that is protected under the First Amendment and the state cannot prevent. And we say if the Court should say the statute itself is all right, it's constitutional, then we say the statute must be held to be unconstitutional to its application of this particular defendant. This is the proprietor of an art gallery who showed these sculpture because an employee to [40] him asked him to show an art gallery, and that is the only thing the statute wishes to express for contempt, the flag of the United States. We say, furthermore, this section, subdivision 16 of 1425 is unconstitutionally vague, and it is, your Honors, it is a fantastic statute for vagueness. For example, the statute prohibits the defacing, contempt by word or act. This is language which describes attitudes which could be communicated by any kind of conduct, any kind of gesture. For example, thumbing one's nose, would this be contempt, something that is forbidden? Similarly, what is a flag? In here it's defined in the broadest possible terms. According to the statute a flag, any substance, any size, it may purport to be the flag of the United States or simply show the colors, the stars, the stripes of the

flag, or it may be an article by which the persons seeing the same without deliberation may be the same represent the flag. If your Honors, please, this is not effectiveness of what constitutes [41] a crime to anyone. And I would also like to call to your Honors' attention subdivision d here, which is one of the subdivisions which this defendant is charged with violating, is not of an object. It says, if you begin up at the beginning of subdivision 16, it begins: "Any person who," and then there is a whole group of subdivisions, each one of which is a complete cause, a subject, a verb, an object, except subdivision d, which says: "shall publicly deface, defile, trample upon or cause contempt upon either by word or act or it has no object." Other subdivisions in this section have an object. This has none. That is certainly vague. But further on this question of vagueness, how could you defy the United States flag, what does that mean? This could mean anything, anything to any person. It may be various things. I might say that to me personally the idea of an exception in this statute for articles of jewelry were commercial, is showing itself not on the basic issue. [42] It shouldn't be done.

I don't believe it should be prohibited, but the idea giving an exception, the works of jewelry, this is in the class of advertising. Now, this Court, the statute, let me say this, must be specific. It must tell what it's going to do. In Cox against Louisiana, the United States Supreme Court, you had a statute which had a perfectly valid purpose. Its purpose was to prevent the obstructions of the public's passage in the streets, but the statute gave no standard for determining how it would be applied, and the U.S. Supreme

Court held that statute was invalid because no standards were set. For determining what was wrong, what is a representation of the flag here, what is a representation of the flag by way of illustration, that statute could not stand up. Similarly, there was a case that came out of Pennsylvania, the Giacci case, 382 U.S. 399. In that case there was a Pennsylvania statute. There were no standards in the statute. Now the state contended, [43] through the Court term tapes, the defendant's conduct had to be reprehensible, improper, outrageous to immorality, before the Courts could be assisted. The Supreme Court held that was constitutionally invalid as written, and because the absence of the sufficient standards to guide the jury.

Judge Basel: I ask you a question. Is it your argument that if these same figures were in a painting and not what is referred to as a piece of sculpture, then the statute would protect it?

Mr. Green: Yes, your Honor, the statute says that expressly. I could also—

Judge Basel: And in the ornamental opinion?

Mr. Green: Yes, exactly.

Judge Basel: Then the only question in this case, as far as you're concerned, is that does this exclude from the statute because it's sculpture, painting and not an emblem?

[44] Mr. Green: That is not the other question. That is an outside question. That is the question that avoids all the constitutional questions.

Judge Strong: It's also if there is actually a contempt.

Mr. Green: That is a question of fact for the Court.

Judge Comerford: For the benefit of the Court, define the meaning today as used as a term, the word "sculpture."

Mr. Green: I will, your Honor: I didn't mean to be testifying. We will put that in evidence. Sculpture today includes any three-dimensional objects, and it has for the last 50 years been made of any kind of material. Sculptors work in fabric, plastic. They work with pieces of used junk that they take out of the used junk, regardless, steel, auto mufflers. In the Whitney Museum today, and the Court could take judicial notice of this, there is a work, Louise Nevelson, a famous [45] contemporary sculptor, who is not exactly a young lady, and her work covers a long period of time. She is a typical illustration of the sculpture today, using materials of all kinds. She puts pieces of wood, fabric on things, she combines all these things. This is something that has grown up in the last 50 years. Again, your Honor, I don't mean to be testifying. I am trying to answer your question.

Judge Basel: I asked this question, how do you get away from applying what is the statute which says you can't show contempt for the flag, assuming sculpture is covered under the statute?

Mr. Green: Let me say this, your Honor, if these exceptions don't apply to contempt, to the employee, then you have a First Amendment question. The way the statute is written, at the end of all the things that can't be done it says: "This subdivision shall not apply to," and then it goes on and it says: "ornamental pictures, articles of jewelry, [46] stationery for use and private correspondence, news-

papers or periodicals on any of which some are printed the sheld or ensign connected or part of any advertisement." In other words, there is an exception here very clearly in the statute for anything not connected with—

Judge Basel: Your argument is the First Amendment will cover contempt for any form of expression as specified in the statute?

Mr. Green: That's right, and the statute had in mind when this was made, so we don't therefore have to get to the First Amendment question.

Judge Strong: This paragraph that sets out the exception, it makes no difference what form that piece of jewelry may be? It might be in the same form as these sculptures?

Mr. Green: That is the way the statute is written.

Judge Strong: Even if it was held to be contemptuous?

[47] Mr. Green: Yes, as far as I can see the only reason for these exceptions in the statute is that the legislature, and there is no legislature history on this, which is true of most of our New York State, but it had in mind it could not interfere with freedom of speech.

Judge Strong: I think what they had in mind was nothing. That is what upheld, in the form of a flag, that kind of jewelry, not jewelry in the form of sculpture such as we have here.

Mr. Green: I was going to say newspapers or periodicals, for example, there is an exception for them, and traditionally newspapers have used the flag in obscene ways.

Judge Strong: You mean cartoons?

Mr. Green: Yes, newspaper cartoons. This is a traditional thing, in color or out of color, and sometimes Uncle [48] Sam, with the American flag, is shown as a pretty miserable fellow, this, I believe, from history books that are from the New York City school system, where I received my education. In the days when some of the papers in the banana republics, they used to do it, Uncle Sam carrying the flag and doing things that were wrong. In other words, I think the legislature had in mind that it was getting out of this First Amendment area, it was protecting expressions of opinion, and you void the whole constitutional amendment for their ornamental picture. They didn't mention sculpture. They put in newspapers or periodicals but they didn't mention books. I don't think anyone would prosecute it.

Judge Strong: Do you have further argument?

Mr. Green: Yes, your Honor. On this question of vagueness we have a recent case in the New York Court of Appeals, People against Bookcase, Inc. That was a case where [49] there was a section of the Penal Law that the Court of Appeals invalidated.

Judge Strong: We are familiar with that case.

Mr. Green: If your Honors, then what the Court said I would like to quote one phrase which is not in my brief, that is, the constitutionality, the publication should be tested by what can be done under it and not by the particular violation which is charged with having occurred. And I think it's very clear what can be done under the statute is if you're going to take it literally, not cover us with that exception, the statute could prosecute an expression of opinion.

It could prosecute speech, whether symbolic speech through a flag or actual, because it says "by word or act," and we say that this fails to meet the test of the Bookmaster case in the terms of necessary clarity and deafness, and on these grounds, your Honor, I move for a dismissal at the close of the People's case.

[50] Mr. Slater: I wish to state first for the record, a hearing was held earlier in this case on February 10th before the Honorable Judge Silver. This case was held for trial on this date. Now, your Honors, the statute has previously held constitutional in the case of People v. Van De Carr, which is a 1904 case. At this time the Court said it was within the police power of the legislature to enact a statute to further the preservation of the peace.

Judge Strong: Is that the case defense counsel referred to, advertising?

Mr. Green: That is not the case I referred to. It did not imply it was constitutional. It implied it was unconstitutional.

Mr. Slater: It held, it applied to certain facts in the case as unconstitutional not on the grounds it was a denial of free speech, but here were certain objects made prior to the enactment of the statute, and [51] the Court said this, in fact, this was an ex post facto regarding this particular defendant in this case, and therefore the statute was unconstitutional to him because it was a denial of due process. As to the statute being constitutional applying to freedom of speech, it held the constitutionality. It says it was within the police power to pass such a law. Now two years later in the Supreme Court, in

the case of Haltena v. Nebraska, in that case there had been occasion to review a similar statute which was enacted in Nebraska. At that time the Court said it is within the power of each of the states to pass such legislation as long as it doesn't contravene federal legislation. Now the only federal legislation that exists in the area regarding the U.S. flag for these purposes which provides any person who, within the District of Columbia, shall publicly mutilate, trample upon or cause contempt either by word or being standard colors or ensigns, shall be deemed guilty as a misdemeanor. This [52] applies solely for the District of Columbia. Therefore, the states are free to enact this type of legislation. As your Honors know, the Penal Law is supposed to be strictly construed. There is no exception here for sculpture. People contend that there are certain objects and conduct which will arouse the wrath of the people and possibly cause violence. These objects might be a flag, as we know it, the fabric or a sculpture as counsel contends this is, and upon seeing the flag dishonored as we, People, contend it has been, the people who view this may be aroused to violenee. And this is what the legislation seeks to prevent and has enacted this statute as part of the police power of the state. The People ask what the defendant's expressing in these objects which he has called sculpture. Now whether a person can be compelled to salute the flag or to give any positive form of respect towards the flag is not an issue here. What is an issue is it's in the power of the legislation. The statute [53] is not vague. Counsel for the defendant said it's vague. Now on to the case of State v.

Schlueter. This was a New Jersey case. The statute penalizes any person who publicly mutilated, trampled upon or otherwise defaced any flag of the United States. The Court said the word "deface" is used in the meaning of dishonor, which is the equivalent of acquiescent callousness. The flag is an emblem of authority and the power prohibits its use and the power to prevent its defilement is certainly within the power itself. If we were to allow individuals to show great disrespect to the flag, the People contend that the public would be aroused to the point where there would be possible riot and strike. Now the Court knows, I am sure, rather the right of free speech as given to us in the Constitution, and that is a license to say what we want to and wish. In the Schends case, as your Honor knows, Chief Justice Holmes said that the power of free speech does not protect a man from crying [54] "fire" in the movie theatre or any theatre when, in fact, there is no such fire. There is a certain amount of restriction on the power of free speech for the overall benefit of every one. In this we contend the statute was intended for the benefit of society as a whole.

Judge Strong: We have here paintings of similar objects instead of three dimensional sculpture.

Mr. Slater: I would say then the legislature took into consideration what objects would arouse the public wrath.

Judge Strong: Three dimensional objects might and pictures might not?

Mr. Slater: Yes.

Judge Strong: Even though they are pictures of the same objects?

Mr. Slater: That's right. Well, for one thing, a photograph in a book is not an animated object and cannot be touched.

Judge Strong: Scultpure is animated?

[55] Mr. Slater: It can be touched, it can be seen, and it is an object more likely to arouse the public wrath. I think this is what the legislature had in mind. It appears the legislature took into consideration which would arouse the public wrath and did not include them in the objects which would be excluded.

Judge Basel: Are you familiar with collage painting?

Mr. Slater: No.

Judge Basel: Where you take forms and pieces and paste them upon a frame and then paint around it. Do you think that would be excluded from the statute or included in the statute?

Mr. Slater: My opinion is strictly a personal one.

Judge Basel: Based on a painting which is a very important form of art today, and then you took oil paint and painted around it, would that be in or out of the statute?

[56] Mr. Slater: I think that would be excluded by the statute since basically that is a painting, but here we do not have a painting.

Judge Basel: You get down to a very definite point of what is excluded and what is not included. I don't think your argument holds water, just because you could touch something it's excluded from the statute.

Mr. Slater: My argument is, your Honors, the legislature had the power to enact this legislation

within its power, police power. The legislature had in mind that the Constitution gives our citizens, those who reside within our quarters, the right of free speech, and any abridgement must be zealously and carefully watched.

Judge Basel: What about the question of this work being contemptuous? Do you say if it was a painting and could be touched you would say the statute does not cover?

[57] Mr. Slater: Yes, I would, because the statute apparently excludes it and you know the Penal Law must be strictly construed.

Judge Comerford: We are specific in the abstract and psysiological reasons here.

Mr. Slater: Yes.

Judge Comerford: We have some of these exhibits, namely, the exhibit on this trial. Do you wish to make any issue of any one of these?

Mr. Slater: Well, your Honors, I have seen the photographs. People contend these photographs represent a mutilation of the flag. This is why this case is before us. There is a mutilation, a dishonor of the flag, and this is in violation of Section 1425 of the Penal Law.

Judge Basel: What you're saying, this flag was mutilated. What I understand, if it was in the form of a painting, then it would not be guilty, is that right?

[58] Mr. Slater: Yes, your Honor.

Judge Basel: So what you're saying, it's broad because it's mutilated in the form of sculpture?

Mr. Slater: What I'm saying, the Penal Law must be construed. The statute does not say or apply to

paintings; the statute had in mind we cannot abridge the power of free speech without some justification. It's a very limited power. Now assuming these objects are an expression of thought of the artist and those who display it, the People contend here to the power of free speech is abridged, and one cannot by word or act arouse the public to such a state that they will cause a riot and strike. Now, in New York State we had the case some years ago back in 1951, the case of Feiner v. The People of the State of New York, where your Honors are familiar with this case. The defendant was in the City of Syracuse and speaking on a street corner and he was talking about the President of the United States and various [59] government officials, including the mayor of the city, and he spoke at great length about the treatment of Negroes, and it was quite critical. There was a large crowd which assembled and grew larger and larger as the defendant spoke. The police, on three occasions, asked him to move on, and on the last occasion to cease speaking entirely, but not as the Court found, not that they started to abridge his right of free speech, but the defendant was creating a condition wherein there might be possibly a riot started at any moment. The Court recognized that there is a certain abridgement of free speech allowed by legislation. In this particular case it was 722 of the Penal Law.

Judge Strong: That concludes your argument?

Mr. Slater: Yes.

Judge Strong: Do you have anything to add?

Mr. Green: Yes, just two [60] things. In the Van De Carr case, which has been referred to by the

District Attorney, is authority for nothing except what was held in the case, namely, that is applied to that defendant of the statute was unconstitutional. Everything else in 1904 is the same. It seems to me the District Attorney's argument in justification and support of this statute is that the state had the power to make this criminal conduct as to a sculpture but not a painting on the theory it was preventing violence. On that I want to say two things. There is not an iota of testimony or anything in the complaint that indicates any threat of any kind of violence by anybody in the premises or outside the premises, so that I would say, as a matter of law, if the thing could be justified on such a basis, the People have failed to produce any evidence of it. Now furthermore, however, on this basis—

Judge Strong: I think that is a conclusion the Court has to draw whether [61] that was the circumstances. I don't think the People have to prove the possibility of the tendency to create a disturbance.

Mr. Green: The Courts have gone further. The Courts have held there must be evidence there has been a—

Mr. Slater: Your Honor—

Mr. Green: Going beyond that, I would say that this business of whether speech may cause violence is a very, very limited justification for a restraint on speech. The Terminiello v. Chicago case, there Terminiello, the defendant was engaging in the most offensive kind of denunciation of Jews, Negroes, of minority groups, and he was arrested on a charge of this kind of thing, and it was in the record, your

Honor, that there was an unruly crowd forming outside, and the Supreme Court said the right of speech is a right that applies to nasty speech, to speech we don't like, to unpopular speech, and it was the duty of the police to prevent the right thing, not to prevent [62] this defendant, Terminiello, from speaking. First of all, in summing up, there is no evidence whatsoever of any threat of violence.

Judge Strong: There is no proof of any crowd collecting?

Mr. Green: No evidence of any kind. In addition to that, your Honor, the testimony to make a distinction between a sculpture is something that could cause violence but not a painting or a book but not a magazine which is involved here, I think is a very thin and nebulous one. This has been extremely limited by the Supreme Court.

Mr. Slater: May I be heard? We must look to the potential of violence, your Honor, not whether there was actual violence. Now, the People contend regarding this particular case there was no need to show violence. We must show there was a defilement or dishonor of the flag, as I said before. As I said before, this Van De Carr case is the only case regarding the constitutionality in New York [63] State, and I said earlier it was ruled unconstitutional regarding these particular defendants because the statute is looked upon, he is ex post facto applied to them, but the highest court felt that this statute was constitutional. Now, where the case that went before the Appellate Division, the decision was as follows: I wish to quote for the Court: "It was

competent to the legislature to make it a misdemeanor to publicly mutilate, defile, deface, trample on or cause contempt either by word or act upon the nation or state flag, and mutilation of the flag may mean the printing of advertisement on the ensign itself. Such legislation is within the police power itself for it relates to the preservation of the peace. It tends to prevent the commission of acts which would arouse the public which would lead to chastisement, or it's not a mere oratorical phrase to say the guardians and protectors of the flag. The state has taken upon itself the punishment whose action would incite the peace, and [64] legislation to accomplish that relates directly to the preservation of the public peace and the good order of society." And I quote the citations: People v. Van De Carr, 1904.

Judge Strong: The Court will take a short recess.

(Court takes a short recess.)

Judge Strong: We do find a prima facie case has been established, and your motion to dismiss at the end of the People's case is denied. Do you want to step up?

Mr. Green: I would like to note my exception for the record. I will call the defendant, Mr. Radich.

Court Officer: Step up. Face the Judge. Raise your right hand.

Judge Basel: Do you swear the testimony you will give in this case to be the truth, the whole truth and nothing but the truth, so help you God?

Mr. Radich: Yes, I do.

Stephen Radich—for Defendant—Direct

STEPHEN RADICH, having [65] first been duly sworn, testified as follows:

Court Officer: In a loud, clear voice, give your name and address.

A. Stephen Radich, 818 Madison Avenue, New York.

Court Officer: Your business or occupation.

A. I own a gallery, an art gallery.

Judge Comerford: Are you a sculptor?

A. No, sir, I am not.

Direct Examination by Mr. Green:

Q. Mr. Radich, if I may take his honest question, you're not the artist who did the works which are represented in the People's various Exhibits 1 through 9, are you? A. No, I'm not.

Q. Are you the proprietor of an art gallery at that address, is that right? A. Yes, I own the gallery.

Q. How long have you had the gallery, Mr. Radich? [66] A. A little over seven years.

Q. What other things do you exhibit in that are gallery and have you exhibited during the course of the time? A. I show sculpture primarily, but I also have paintings and drawings and other art objects.

Q. And before that, what was your experience in the art gallery business? A. I've been in the business roughly 14 years, having worked with the Court Valentine Gallery, the Martha Jackson Gallery and the Wier Gallery.

Q. Prior to that, did you have any education in the field of art? A. Yes. I have a degree in Fine Arts at Columbia University.

Q. In getting your degree, did you specialize in any particular field of art? A. Primarily in contemporary art, history of art, but there was an emphasis on contemporary art.

Q. By the way, do you mean by contemporary, what century? A. 19th and especially 20th century art.

[67] Q. Now, let me ask you this; you're familiar with the art, with the field of contemporary art, 19th and 20th century art; could you tell us something about the use of materials in art, 19th and 20th century art, particularly 20th century art? A. The works of art that have been produced within the last 50 years have varied considerably. Painting, just using oil paint or other kinds of paints, such as tempera, or sculpture using stone or bronze, is not any longer primary materials that artists use. Artists now use a various variety of materials in their work. The sculptors use wood, they use junk, they use cloth, they use glass, plastics and many materials that are coming into being through the advance of technology and products of new substances. The artists are finding these things valuable and are using it in their works of art.

Q. Now, there was a question raised before by one of the judges having to do with collage. What are the uses of materials on those? A. Artists have used scraps of paper, fabric, plastic, chips of wood, and they have glued these together on wood, on canvas. There have been many objects.

[68] Q. So collages, even though they are hung in a frame, involve three dimensional? A. Yes.

Q. Now, turning to the works that were displayed in your gallery, when the police officer testified he was there on December 28th, how many works of three dimensional art were there in that show? A. There were roughly 13.

Q. They were all done by one artist, Marc Morrel? A. Marc Morrel had a one man show, and all of his work was displayed in about two-thirds of the gallery.

Q. And before that, could you tell us when that show ran in your gallery? A. It opened on the 13th of December and ran through, I think it was the 7th of January. Those were the dates of the shows. It was extended approximately two weeks.

Q. Did you send out any notices to any mailing list or persons about this exhibit? A. Yes, a brochure was sent out for this exhibition, as done with all other shows I have.

[69] Q. I show you this piece of paper and ask you if you can identify it? A. Yes. This is the brochure that was sent out for the Morrel exhibition.

Q. And to whom did you send that out? A. I have a mailing list that includes some fifteen to eighteen hundred names, and that is collectors, museum people, etc., the press, and universities, art departments.

Mr. Green: I offer this in evidence as Defendant's Exhibit B.

Mr. Slater: No objection.

(So marked by reporter.)

Q. Was that the circular that was available in the gallery during the time the works were on exhibit? A. Yes. I always had a dozen or so available for people who come to the gallery that want to know the artist's name or want a souvenir.

Q. Now, did you mention there were 13 of these three dimensional figures? Were there any other works of that artist, Morrel, at the gallery at this time? [70] A. Yes, three framed watercolors depicting works that were in the exhibition or works that the artist had in mind that he may not have yet made or constructed.

Q. Well, will you tell us which of the works or which works in the exhibit, the three dimensional works, was depicted in a watercolor that was hung on the wall? A. The sculpture that was hanging in the window was also depicted as a watercolor and was framed hanging on the walls.

Judge Strong: That is the one that involved the noose?

A. Yes, your Honor.

Q. Did either of the other two watercolor paintings, did they make any use of an American flag or an American flag motif? A. Yes. The other two also had an American flag motif in the workings.

Q. And they were framed and hanging on the wall with the watercolor of the hanging figure? A. Yes, they were.

Judge Basel: Has Morrel [71] exhibited in New York before?

A. Yes, he has, your Honor, in group exhibits, but this was his first one-man show.

Judge Basel: What is his background as an artist?

A. He has been in New York roughly eight or ten years, I suppose. I first saw his work about four or five years

ago. He was then primarily involved in painting, and I saw his work in group exhibits, and he then had the one-man show in my gallery.

Judge Basel: Has he studied painting or sculpture with anybody?

A. I am not certain about his education.

Q. His works have been exhibited in other galleries in group exhibits? A. Yes, they have been.

Q. Now, during the exhibit of these works of Morrel's in your gallery, was there any musical background played? A. We had a tape recorder with protest songs playing during the show.

Q. What were these songs protesting? [72] A. Primarily, they were war protest songs.

Q. Now, in terms of Morrel's work, were these works for sale? A. Yes, they were all for sale.

Q. Did you ever tell the police officer, as I believe he testified, that there was no price on them? A. No, I did not. I told him that all the works were for sale.

Q. And did you have prices on them? A. There was a price list available if anyone asked for it, yes.

Judge Strong: What was the price range?

A. The constructions were priced from 250 to $1,200.

Q. Now, in terms of your familiarity with the history of art, have you ever encountered the term, "protest art"? A. Yes, I have, certainly.

Q. And would you describe protest art to the court? A. Well, there have been many forms of protest art. For example, Michelangelo, we could say, protested [73] against

the church when he painted one of the cardinals who was a future Pope Paul the Third in a position which he considered Hell because he was upset by the actions and the behavior of the ecclesiastics. There was a great artist, the 18th century Goya in Spain, who did many protest pieces. The famous thing was the disaster of war. He also protested against the corruption of the Spanish court, and did a famous series, which was called Capriccios and Eudonia [sic Daumier], in the 19th century, protested in his art of the misuse of justice and depicted lawyers and judges and also depicted politicians in his cartoons. Recently, Pablo Picasso did the Guernica, which is in the Museum of Modern Art, and this was a very violent and brilliant work of protest. This occurred during the Spanish Civil War. There are many others like this.

Q. In terms of the 20th century and more recent times, could you think of any artist that protested against Nazism or Germany?

Mr. Slater: I object to that. I fail to see the need of going into this any further.

[74] Judge Strong: I think we're going somewhat far afield.

Q. Now, turning to the work that you were exhibiting, the work of Mr. Morrel, the artist, did you consider those works as works of art? A. Yes, I considered them works of art.

Q. Did you consider them to be protest art?

Mr. Slater: I object, leading the witness.

Mr. Green: I withdraw the question.

Q. What type of art did you consider them to be? A. They were protest art, by and large.

Q. Could I have the People's exhibit, please? What do you, as the operator of an art gallery and one with a background in art history and contemporary art, what protest did you consider them to be making? A. Well, I felt there were many protests. There were protests of the war in Viet Nam or war in general, destruction, protest against certain societies, and justice in this country, protest against the infringement [75] of the people's rights to use freedom of speech.

Q. Did you consider, in exhibiting these works, you were being contemptuous to the flag of the United States? A. No, I did not.

Q. Did you have any idea or did you think Mr. Morrel, the artist, was being contemptuous to the flag of the United States?

Mr. Slater: I object.

Judge Strong: Sustained.

Mr. Green: Your Honor, on that again, getting down to the business of the opinion which is in the statute, that is the only reason I raise the question.

Judge Strong: I don't think the witness is in a position to testify for what Mr. Morrel had in his mind.

Q. Did you have any intent then to express yourself in contempt for the flag by exhibiting these sculptures? A. No, I didn't.

Mr. Slater: I object.

[76] Judge Strong: Overruled.

Q. Now, as an art gallery operator, when you exhibited paintings or sculptures you testified they were for sale,

and what is your business arrangement, what was your business arrangement with Mr. Morrel? A. My business with Mr. Morrel, as well as all the other artists, and this is generally the practice by most galleries, the works are consigned by the artist to the gallery, the gallery sells the work, and the gallery receives a commission of one-third or three and a third percent.

Q. And that was your arrangement with Mr. Morrel? A. Yes.

Q. Have any of these works been sold by you? A. One of the sculptures was sold.

Q. And you received your commission on that? A. Yes.

Judge Strong: Private purchase?

A. Yes, private collector.

Mr. Green: Could I have the [77] Defendant's Exhibit A?

Q. I show you here a copy of Life Magazine, the publication dated March 31st, 1967, and I direct your attention to page 22 of that issues of the magazine. Does any photographic reproduction on that page represent a true picture of a work of any kind that you have seen yourself? A. Yes, I am familiar with these works.

Q. Which are you familiar with, all the works on that page? A. I've seen two of them, the actual pieces, and one I've seen reproduced, and now that it was in an exhibition in the Museum of Modern Art.

Q. Which one is that? A. That is the figure here, here on the left, by a Japanese artist by the name of Kojimi.

Q. And which of the works have you, yourself, seen? A. I've seen this painting by Wesselmann, and I've seen—

Q. That is the one on the right? A. Yes, and the one up above by Jasper Johns.

[78] Mr. Green: I offer this page 22 of Life Magazine in Evidence as Defendant's Exhibit, the photographs, Exhibit C.

Mr. Slater: Your Honors, I object to the introduction of these photographs, one on the grounds that all three are irrelevant to the case at hand. As to the one which is in the lower left-hand corner, the defendant has himself testified that he is not personally familiar with this work of art, that he has not seen it for himself.

Judge Strong: We don't see the relevancy in this particular case.

Mr. Green: Well, if you Honor, please, the relevancy, I believe, is that these once again demonstrate and they go to the one, the basic issue in the case, that if, in fact, there is no exception, either there is an exception for these works and that includes sculpture and these things, and not for these which are the samples that are exempt and not the sculptures, then the statute discriminates [79] unfairly as an exhibitor of sculpture.

Judge Strong: The mere fact that they appear to be reproduced in Life Magazine, that doesn't mean they are exempt from the statute.

Mr. Green: Your Honor, the statute expressly says ornamental pictures are exempt, newspapers and periodicals; and the witness has testified that he has seen the originals of the things reproduced there, and he has seen them and I would from there go on and show where he has seen them.

Judge Strong: That still doesn't prove they are exempt from the statute.

Mr. Green: Your Honor, we are offering them in evidence to the kind of things that are exempt from the statute. We would like the record to show that these things are exempt from the statute and there is discrimination.

Judge Strong: That is your argument.

[80] Mr. Green: Yes. Then the purpose of having them in there is to have them in there in case your Honor decides against this.

Mr. Slater: There is no judicial authority from the statute.

Mr. Green: We feel the Court, in order to make a determination whether the works that are involved in this exhibition of the defendant, it is necessary for the Court to know the kind of works that are exhibited, and that may or may not be exempt from the statute. The Court may say none of them are exempt. In order for the Court to have a picture what is involved in the world of art today so this defendant has his case fully presented, we feel these are essential.

Judge Basel: We have no collateral knowledge to know if this was prosecuted or not.

Mr. Slater: The counsel wants to bring into evidence items that were [81] not on display by this defendant. These are not the subject at hand.

Mr. Green: They are the subject of the case at hand. It's on the question of the whole business of what is art today. If the state, if the legislature has no power to prevent expression by words, by painting, by symbols, by any form of art expression, then

these are pertinent to the case because in this way we have before the Court the articles, the kind of articles, the kind of works that are considered works of art today, and they go also to the question that has been raised by this Court about whether something contemptuous in terms of morals. This word "contemptuous" is a very vague word to hold the flag in contempt. In other words, one, the morals of our day in terms of what may be done, what may not be done, this is true in various types of speech, something like the moves of Ulysses. It was true in the bookcase of Ulysses, what is appropriate in language or any form of expression [82] varies with the morals of the time.

Judge Comerford: Counselor, your client, this defendant, is not being charged with possession of these items that we are exhibiting. We have a specific issue before the Court. We have the People's exhibit here and we have the defendant's exhibits.

Mr. Green: That's right, your Honor, but he is charged—

Judge Comerford: That is sufficient for this trial. We are not trying out an investigation. We are not here to investigate anybody. We are a court to find out what crime was committed and—

Mr. Green: The defendant is charged with violating one of two subdivisions, f and d. D does not charge anything publicly mutilate or pass contempt, but subdivision f, which is the other one, he is being charged for doing something that is the charge of publicly carrying or displaying any emblem, placket or flag which causes contempt upon the [83] flag of the United States of America, but that is what it says. Now, what we say is that the phrase, cause

contempt upon, and that is what he is charged with doing here, displaying something that caused contempt on. This is extremely subjective terms, one way we can determine something the legislation is valid and not void for having necessary one way. We can determine whether he is causing contempt to the flag is apart from his own attempt is what is being done in societies in our world today calmly and gently, not whether other people are committing crimes.

Judge Comerford: We are concerned about what the defendant did at this time and place.

Mr. Green: That is exactly correct. Whether speech is right or wrong, whether expression is right or wrong is dependent upon the trial.

Mr. Slater: People contend this collateral matter should not be received.

[84] Judge Strong: For that purpose the counsel has outlined we will receive them.

Mr. Green: Thank you.

Judge Comerford: For the purpose of making contrasts and comparisons, subject later on to evaluation.

Mr. Green: I understand the Court will evaluate all the evidence. I have no question about that.

Q. There is a reproduction there, Mr. Radich, of a work by an artist by the name of Wesselmann, I believe, in the lower right-hand corner of that page. I have another copy of it. If it will help the Court, I could let the witness look at this. Am I correct that it was your testimony that you had actually seen that work? A. Yes.

Q. Is that all painted or are there fabrics on it or other

materials? A. It's partly collage and partly painted, as I recall.

Q. Do you know if the flag is painted on it [85] or is it a large flag that is pasted on it? A. I think the flag was real. There was other fabrics, there was paint and actual reproduction of a painting, as I remember the picture.

Mr. Green: I have no further questions. Your witness.

Cross-Examination by Mr. Slater:

Q. Mr. Radich, are you the sole owner of the gallery? A. Yes, I am the sole owner.

Q. When did you first acquire this gallery? A. It was about 1960.

Q. When did you acquire these objects which were exhibited? A. The Morrel objects?

Q. Yes. A. They were delivered to the gallery a few days before the exhibition was open.

Q. During the time of the exhibition, specifically on the case in question, December 27th and December 28th, was this gallery open to the public? [86] A. Yes, it's always open to the public.

Q. Is there any admission charge? A. No.

Q. Any persons excluded from that gallery? A. Everyone was free to walk in.

Q. What was the arrangement that you had specifically with Morrel as to the commission that you would receive? A. My arrangement with Morrell, as with every other artist, I receive a commission for the works that are sold.

Q. Well, specifically, what were you to receive from Morrell? A. If the work of art was sold, the amount of money received was to be divided. He was to receive two-thirds of the amount and I, one-third.

Q. And you sold one object, you said? A. Yes.

Q. How much was this object sold for? A. I believe it was $900.

Q. And did you receive about $300? A. Yes.

[87] Q. Mr. Radich, I am going to ask you to examine People's 3 and People's 4 in Evidence. These are photographs of one particular sculpture, is that correct? A. Yes.

Q. Depicted here is a cross, is that correct? A. Yes.

Q. Now, there are several flags involved, aren't there? A. Yes, there are.

Q. Could you tell the Court which flags are involved and where they are situated on the cross?

Mr. Green: I object to that. I think the representation speaks for itself.

Mr. Slater: There has been an objection, and I contend, since these are supposedly works of art, counsel for the defendant has stated that the defendant should probably state exactly what the composition parts are and the work of art.

Judge Strong: Which are you referring to now?

[88] Mr. Slater: People's 3 and 4.

Judge Strong: You mean what it is made of, up of?

Mr. Slater: Yes.

Judge Strong: What is your question?

Mr. Green: Read back the question.

(Reporter read back the question.)

Mr. Green: My objection is it speaks for itself.

Mr. Strong: I think the question is not quite clear. I think it's objectionable. Overruled. I think you should rephrase it.

Stephen Radich—for Defendant—Cross

Q. Specifically, is the American flag involved; is there a portion of the American flag connected with this exhibit or made part of the exhibit?

Mr. Green: Again I object on the exhibit. It clearly speaks for itself. The Court is—

[89] Judge Strong: Overruled. You may answer it.

A. Yes, there is a part of the American flag used in this construction.

Q. Was the American flag depicted as in this exhibit?

Mr. Green: I renew my objection.

Mr. Slater: Your Honor, counsel for the defendant has stated these objects are a form of protest, a form of speech, and I wish to find out exactly what the American flag is supposed to be saying in these various exhibits.

Mr. Green: If counsel wants the witness to testify as to what this sculpture's protest is, I think that is a perfectly proper question. He should ask it instead of name by name. What the Court could see, I have no objection to that question.

Mr. Slater: I intend to ask that question.

[90] Judge Strong: You allowed a great deal of limit in your direct, so I think the People should be allowed also. Proceed.

Mr. Slater: Would you read back the question?

Q. What is that supposed to be doing? A. Well, it seems to represent a penis.

Judge Comerford: A human penis?

A. Yes, your Honor, it would suggest that.

Q. Now, there are tassels about the American flag at the base of this cross as it appears. Could you tell the Court what these tassels represent? A. It is probably a decorative or pubic hair, depending on what one decides it looks like to him.

Q. As to the main body of the cross, that is the vertical piece, what flag is involved? A. That is the Panama flag, I believe.

Q. Now, as you face, as you're looking at People's Exhibit 3, what flag is involved on the left crosspiece, the horizontal piece? A. I'm not positive, but I think it's the Episcopal flag or Christian flag.

[91] Q. On the right crosspiece what flag is depicted there? A. I think that is a Christian flag, but I am not sure which.

Q. Please tell the Court what this object was expressing or protesting. A. Well, in my opinion, I believe that this work is a statement by the artist which he is showing or trying to depict that there is not a separation of church and state, that the government of this country is involved in aggressive acts of war. Perhaps the penis represents the sexual act by which substandards is considered an aggressive act. The figure represents a cross. Religion, organized religion on the symbol here, and it seems to suggest that organized religion is supporting these aggressive acts that are being made. It also suggests that this is also a puppet, that the church or organized religions are either supporting or leading these actions of aggression or they are being led by it. That is my interpretation.

Q. What was this object selling for? A. This was priced at $1,200 during the exhibition.

[92] Q. Did you sell this? A. This piece was not sold.

Mr. Slater: I have no further questions.

Judge Strong: You may step down.

Mr. Green: Excuse me. I would like to ask another question.

Redirect Examination by Mr. Green:

Q. In connection with the People's Exhibits 3 and 4, which I believe you have been asked about, this particular work, this particular construction as protest, was it your opinion that the artist was expressing contempt for the flag or contempt for people who were using the flag as an aggressive weapon?

Mr. Slater: I object, your Honor.

Judge Basel: Please read back the question.

(The reporter read back the question.)

[93] Judge Strong: You're asking for his own view or what the artist had in mind?

Mr. Green: Yes, his own view, because he is the defendant in this case.

Judge Strong: Overruled on that understanding.

A. In my view, I think the artist was not being disrespectful to the flag. In fact, he was questioning the behavior of the organizers, the government, whatever is involved here, that are involved in the acts that are being performed and supported.

Q. By the acts that are performed and being supported, what action are you referring to; what action did these—

A. Aggressive action of war, and they are being supported

by organized religion, by the country, and he feels that it would seem to me that he is showing the disrespect on the part of the people involved in these organizations, rather than disrespect for the flag itself.

Mr. Green: May I have People's Exhibit 1, please, or People's [94] Exhibit 2?

Judge Strong: Yes.

Q. I show you here People's Exhibit 2. That is the hanging figure in the noose. Could you tell us what, to you, the artist appeared to be protesting here?

Mr. Slater: I object, as this question is improper on redirect.

Judge Strong: There seems to be improper redirect examination.

Mr. Green: I would agree with your Honor. I feel, however, the People have opened this whole field, what the protests are, by picking and selecting one exhibit from the whole group, which I must say which has been picked deliberately obviously because of its sexual connotation rather than any other. There is no charge of obscenity I must emphasize, and the selection of that one of all these exhibits adds to what might be protested here I think puts an unfortunate coloration on the defendant's case, and for that reason I [95] felt the People have opened their door on the cross-examination to bring in the subject of what was being protested in these various—

Mr. Slater: Nothing new has been brought in, your Honor, by the People's cross-examination of

this defendant. The defendant's counsel has ably pointed out these objects are, in fact, protestations. This could have been brought out on direct examination of this witness.

Judge Strong: We'll permit it, what the construction means to him in the way of protest. I don't think we should go through each one of these exhibits.

Mr. Green: My only purpose, your Honor, was not to leave this one thing which comes out, way out of context. I would have no objection with this one, and I'll let it go with this.

Judge Strong: We are aware this is not an obscenity case.

Mr. Green: Read the question [96] to the witness.

(Reporter read the question.)

Q. What do you feel this is? A. I believe, as I read it, it is the artist, he is questioning whether the people of the United States are really being allowed the kind of freedom they are supposed to be allowed under the Constitution. In fact, I read it as freedom of speech and other freedoms being hanged by the noose, and the flag is symbolizing this.

Mr. Green: No further questions.

Judge Comerford: Counselor, are you telling the Court in your last answer that is your conception of what is means or what is the artist's conception of what it means? A. That is my conception.

Judge Comerford: What is your conception of these items that you displayed in your business; what was your purpose in displaying them? A. I displayed them because they were works of art, [97]

and because of all other works of art in the gallery they were for sale.

Judge Basel: You may step down.

Judge Strong: Anything further?

Mr. Green: We have one further witness. It's ten of 1:00 now, and he'll not be available until after lunch. I would like to ask if we could take the lunch recess and then bring him in.

Judge Strong: You're supposed to be ready at the start of the trial.

Mr. Green: Your Honor, you are absolutely right. We have a witness who, unfortunately, we have no control of. He is coming here. He is under subpoena, but at the same time it's now ten to 1:00, but we figured we would be running about this way and his testimony will perhaps—

Judge Strong: What is the purpose of the author?

Mr. Green: The purpose of [98] putting this witness on, I'll tell you who the witness is, your Honor. Witness is Mr. Hilton Kramer, who is the art news editor and art critic for the New York Times, and a well established figure as an expert in contemporary art, and in terms of 19th and 20th century art particularly. In fact, he is going to be lecturing at Ohio State, and the purpose in putting Mr. Kramer on is to emphasize the various materials in art, sculpture and painting today, that these things clearly are works of art. He is one of the critics that reviewed this show and the works of art that were there. The art need not be beautiful or attractive to me or the District Attorney and that as such, and they come and since they meet these qualifications or purposes—

Judge Strong: I don't know if that is an issue, whether they are works of art or not. The statute doesn't refer to works of art.

Mr. Green: It doesn't, [99] your Honor, but while the statute doesn't, if these are works of art, well, let me say this to you, I think whether they are works of art is just forms of expression which is completely protected by the First Amendment.

Judge Strong: Then why do we need an art expert?

Mr. Green: Will the District Attorney like to concede these are works of art?

Mr. Slater: The People will not do this, and the People will be glad to call people to testify whether they are objects of art, and it is not an issue whether there has been a defilement of the defacing of the flag.

Judge Strong: Within the prohibition of the statute.

Mr. Slater: Yes, precisely.

Mr. Green: But the statute makes exception for ornamental pictures when we say also applies to sculpture. Furthermore, [100] the witness we are calling, People could call anybody they want if the testimony is pertinent, but the witness we are calling is an expert.

Judge Comerford: He is an expert?

Mr. Green: He'll either qualify as an expert or he'll not. If he doesn't qualify as an expert then I'm wrong, but if he qualifies as an expert then his testimony is pertinent and relevant. Obviously, I can't qualify him. I'll attempt to, and you Judges will determine whether he is an expert.

Mr. Slater: This is not whether they are works of art. It's whether they fall in the purview of the statute.

Mr. Green: It would be nice for the District Attorney if things were as he says, but unfortunately I don't believe it's correct. It is a very definite issue as to whether these things fall in the purview of the statute. You have many questions, one, the basic question of the matter, are they excluded from the wording of the statute by [101] the language? Then, of course, if the Court says, no, they are not excluded, they are not protests, then you come to certain constitutional questions and we do have Supreme Court questions whether these are works of art or protest works of the expression that the State has no power to do anything against them, and that being the case, this does become relative. And I would say the First Amendment issue is a basic issue, an applicable issue, whether they are considered works of art or not, that wouldn't make any difference, the First Amendment issue would be the same.

Judge Strong: 2:00 o'clock.

(Case adjourned until 2:00 P.M.)

Court Officer: Case on trial, Stephen Radich.

Mr. Green: I have a subpoena here.

Judge Strong: Is your witness here?

Mr. Green: Yes, he is here.

[102] Judge Basel: Raise your right hand. Do you swear the testimony you give in this case will be the truth, the whole truth and nothing but the truth, so help you God?

Mr. Kramer: I do.

Hilton Kramer—for Defendant—Direct

HILTON KRAMER, having first been duly sworn, testified as follows:

Court Officer: Be seated. Please, in a loud, clear voice, give your name and address.

A. My name is Hilton Kramer, and I live at 238 Dean Street, Brooklyn, New York.

Court Officer: Your business or occupation?

A. I'm the art news editor of the New York Times.

Court Officer: Answer all questions in a loud, clear voice, please.

Direct Examination by Mr. Green:

Q. Mr. Kramer, how long have you been the art news editor of the New York Times? A. Since November, 1965.

[103] Q. What are your duties in that position? A. My duties are to review contemporary exhibitions of painting, sculpture, primarily in New York, also across the country and abroad, and I'm also the editor of the Sunday art page. In that capacity I commission other writers to write on the same subjects.

Q. Previous to your employment by the New York Times, did you have other employment as an art critic? A. Yes, I have been the art critic for the New Leader and for some years the art magazine in Contemporary Art.

Q. Have you ever taught on art history or on art? A. Yes, I've been on the faculties of universities, Colorado, also Bennington College in Bennington, Vermont.

Q. Outside of the publications you have worked for as an art critic, have you ever written for any magazines?

A. I've been widely publicized in art, in the American Art Form, Art International, New York Times [104] Book Review, Cosmopolitan Shows, Hudson Reviews.

Q. Are you a member of any professional Societies of art critics? A. Yes. I am a member of the International Art Critics Association.

Q. Do you from time to time lecture outside the college teaching you mentioned on the subject of art? A. Yes. I lectured widely at the universities, museums, art societies, conventions of art, teachers and art schools.

Q. Is there any particular field of art on which you generally lecture? A. Well, mainly 19th and 20th century art, but I very frequently lecture about the 20th century sculpture, and I will be lecturing on that subject at Ohio State and Columbus.

Q. Have you ever been judge of any art competition? A. Yes. I judged exhibitions in the west, in Minneapolis, in New York State and Tennessee, and have turned down requests to do so in more cities than I [105] can enumerate.

Q. Now, sir—

Judge Comerford: Excuse me. Where did you get the training and experience that qualified you to do these things that you tell the Court that you're now doing?

A. Well, I've been, I've had a thorough university education.

Judge Comerford: What university?

A. Syracuse, where I got my Bachelor of Arts, Columbia, Harvard and the New School for Research.

Judge Comerford: Did they all teach art?

A. I beg your pardon?

Judge Comerford: Are you an artist?

A. No. I painted when I was younger, but I am not an artist today. I grew up among artists when I was younger, and I have frequently associated with artists for as long as I can remember.

Q. How old are you, Mr. Kramer? A. 39.

[106] Judge Basel: Have you had any formal art training?

A. Well, I studied painting under the W.P.A. art in the thirties.

Judge Basel: When you went to college did you major in art?

A. No, I did not.

Q. Now, in terms of your familiarity with 20th century art, and you've mentioned 20th century sculpture, will you tell us what materials—I withdraw that question.

Judge Strong: Just a minute. Do the People have any objection to the witness testifying as an expert in modern art?

Mr. Slater: I have not heard the questions if he is going to be called for his expertise.

Mr. Green: Yes.

Judge Strong: He is being offered as an expert, as I understand.

Mr. Slater: The People object to it. The People object as to the [107] expertise because the People's contention is there is no need for expertise.

Judge Strong: That is not the question. The only question is whether you accept the witness.

Mr. Slater: I'll accept him.

Judge Strong: Proceed.

Q. About how many art exhibits in sculpture and painting have you gone to in the last year, Mr. Kramer? A. Oh, probably something in excess of 500.

Q. Was this about the number you've attended over the last seven or eight years? A. Yes.

Q. Now, will you tell us, in connection with 20th century art, what are the materials of 20th century artists; what are they using in sculpture and in painting? A. Well, that question is perhaps best answered in the negative because there is virtually no material which contemporary artists are not applying in some form or other, whether it be fabric, plastic, pigment, [108] metal or whatever. Offhand, I can't think of any physically existing material that has not been applied in some form or other in a work of art.

Q. These works are shown in museums and art galleries showing these materials? A. Yes, they are.

Q. How would you define a work of art, Mr. Kramer? A. I would define a work of visual art as any physical object specifically whose visual properties specifically designed to communicate an aesthetic emotion.

Q. Is the communication of aesthetic emotion necessarily an emotion of pleasure or beauty? A. No. It has been specifically a characteristic of the modern movement in art that aesthetic emotion is considered painful or combinations of pleasure and pain or any degree in between.

Q. Now, I show you here a group of exhibits. They are People's Exhibits #1 through 9, and I ask you to look at these, please. A. Yes.

[109] Q. Are those photographs representations of figures or sculpture which you have seen in the past? A. Yes, I have.

Q. And where did you see them, and what were they? A. I saw them on exhibit at the Radich Gallery sometime in December, I believe, I don't remember the exact date, on my formal reviewing, around on a Thursday, which is the day I normally go to the galleries for the purpose of writing my reviews for the Times.

Q. What brought you to the Radich Gallery on that day? A. Well, at the art news desk we received an announcement of every exhibition taking place in New York, and my colleague and I go over these announcements and decide which exhibitions and which galleries we are going to visit that week. And I drew the Radich Gallery that week and included it on my list.

Q. I show you here Defendant's Exhibit B and ask you if this is the same as the announcement which you received or saw for this exhibit? A. Yes, it is the same.

[110] Q. Had you answered, did you, in the course of your work, rate a review of the Morrel exhibit at the Radich Gallery? A. Yes, I did.

Q. I show you here a newspaper clipping and ask if that contains your review? A. Yes, it does.

Q. Would you tell us what day's paper of the New York Times this appeared? A. December 21st, 1966.

Q. That was a Saturday? A. A Saturday.

Mr. Green: I would like to offer this in evidence as Defendant's Exhibit D, I believe.

Mr. Slater: I object to the introduction. The composer of this article is present in Court. I have no objection to him testifying what he wrote about. I

feel that it's improper to introduce this article into evidence.

Judge Strong: You want him [111] to recite the whole article word for word?

Mr. Slater: No, but he could state to the Court what his opinions were at the time that he reviewed this exhibit. I see no need to introduce into evidence this article.

Judge Strong: This is just a means of saving time. It seems no point in having to repeat everything that is in the article.

Mr. Slater: It seems to me procedurely—

Mr. Green: I wouldn't push it.

Judge Strong: It's pointless to make such an issue of it. Technically, the objection has to be sustained.

Mr. Green: I won't push it if the District Attorney wants to stand on his objection.

Q. The purpose of offering it, I should state for the record, was not to give the witness' opinion of [112] the show that he saw but to indicate that this exhibition was—

Judge Comerford: Why don't you ask him what his purpose is rather than you?

Mr. Green: I am not trying to testify. I am trying to give the purpose for which I was giving the evidence.

Judge Comerford: It was ruled out, so it serves no purpose. Let's move on.

Q. Have you seen other works of art at the Radich Gallery; have you reviewed other exhibits there? A. Yes, I've reviewed exhibits there frequently.

Judge Strong: In connection with that previous ruling there was such a review written for the newspaper?

Mr. Green: That is my only point.

Judge Strong: It's in evidence now.

Mr. Green: That is why I don't press the business of using the exhibit.

Q. Do you consider Mr. Radich's gallery a [113] serious gallery, exhibiting works of art? A. Yes, I so consider it, and I think it is generally so considered in the New York art community.

Q. On the basis of your definition—withdraw that. Now, you are familiar with the general term, protest art? A. Yes, I am.

Q. On the basis of what you have given us as your definition of works of art and your knowledge of 20th century art, would you say, in your opinion, that the works which are shown in the exhibits, People's Exhibits 1 through 9, represent works of art? A. Yes, it is my opinion they represent works of art.

Judge Strong: Did you say they give rise to an aesthetic emotion?

A. Yes, I would.

Judge Strong: Could you name what emotion that is?

A. Well, I would have to say that I think that the only emotions they give rise to, these aesthetic emotions, because my own view of them as in their [114] extra-artistic capa-

city, is that they are not very interesting. I don't think they are very high form of art, but I none the less think they attempt to come to grips with certain formal problems in sculpture that now have a tradition of fifty years behind them. I don't think they do this extremely well, but I think their intentions are serious in that direction.

Q. Now, you testified in answer to the Judge's question, Mr. Kramer, that in their own aesthetic aspect you did not think these were so great. Do you mean in protest art? A. Yes, in works of protest art I thought they were rather feeble because, in my view, the artist was much more engaged by the visual spectacles of his materials by whatever social intent that may have been laid with them.

Q. The fact that they failed, in your view, as works of protest art, did that make them any the less works of art? A. Not at all, if, in fact, it made them more exclusively works of art.

Judge Strong: Because they [115] are more of an aesthetic than a—

A. Yes, in my view, yes.

Judge Comerford: Would you care to select one and describe to us what aesthetic emotion arises from 1, People's 2 and 3; as a beginner, tell us what emotions, aesthetic emotions, arise from observing either 1 or both of them?

A. Well—

Judge Comerford: Take one at a time.

A. Yes, this is 3. They are actually two views of the same figure, both of these exhibits. These sculptures are clearly

intended to be figures clearly intended to show a male figure with his phallus erected.

Judge Comerford: What do you mean by his phallus? Some people don't understand that word.

A. With his male sexual organ erected. And I assumed when I first saw this work that the artist was making it quite familiar with social military violence, with sexual excitement and social that one sees on [116] numerous television shows and movies and novels and so on. However, as an art critic, that seemed to be a very minimal idea, and I was much more interested in the design of the figure, the fact that it was symmetrical, rearranged in the kind of cross form with this sort of textural effect as a kind of face and chest, a red cross on one sleeve, etc. These are more or less the aesthetic association. I seem, with this figure it seemed well done. I couldn't see that it had much substance, but as an artistic idea I would place it low but well in the category of the artistic accomplishment.

Judge Comerford: What is it supposed to arouse in the public? You told me a lot but you didn't answer my question.

A. Well, I'm not sure it's possible to describe an aesthetic emotion being other than itself. I am not sure then.

Judge Comerford: Describe what an aesthetic emotion is.

A. An aesthetic emotion, I would suggest, is an emotion derived from the observance from a form of a [117] thing rather than any of its aspects to make it in every categori-

cal term, and that is being one that derives from the form rather than the object.

Mr. Green: I have no further questions.

Cross-Examination by Mr. Slater:

Q. Now, you've viewed the exhibits which are People's 1 to 9, and you've personally seen the subject matter on display at the Radich Gallery. Could you describe any of these objects as being an ornamental picture? A. I beg your pardon?

Q. Would you call any of these particular objects which are in question an ornamental picture? A. No, I would describe them as an ornamental sculpture.

Q. Would you describe any of them as an article of jewelry? A. No.

Q. Now wouldn't you say it was your feeling that the artist who constructed these objects was more [118] or less getting a kick out of doing this than trying to make some sort of protest or political protest, some sort of personal gratification rather than trying to express himself in a political vein? A. I would have to answer that question in two stages, if I may, one, in terms of what I took to be the artist's intentions, and the other, what I took to be his success in realizing it. As to the first, I took it to be the artist's intention to be creating a form of art which was making a social commentary.

Q. How did you reach this conclusion? A. Through my familiarity with this medium, this as an art medium.

Q. Have you seen, in the past, numerous exhibits of art in the form of a social protest? A. Yes.

Q. Now, as to what was conveyed, what was your idea?

A. As to my statement of his success in making the social commentary, I felt it was minimal. I felt as an artist he was much more, he was much more engaged by the visual spectacle of the materials he was dealing [119] with than in conveying any social commentary.

Q. Now you said these exhibits were well within the framework of what we call art; now wouldn't you say that he would call almost any object on exhibit in a gallery an object of art, some having more matter than other objects? A. Yes, anything specifically designed to be a work of art, whether it's poor or high quality, is a work of art.

Q. What would you call something of high quality to be a work of art? A. Are you asking me to repeat my last definition?

Q. What a work of art is.

Judge Strong: He has given that on direct examination.

A. I would say a work—

Judge Strong: Just a minute.

Mr. Slater: I withdraw the question.

Q. I ask you to examine People's 2 in Evidence. A. Yes.

Q. At the time you viewed this, what was your [120] opinion as to the message, if any, which was conveyed by the artist? A. I didn't take the work of art to be one that communicated a message exactly. It seemed to me an attempt to make a certain kind of form suspended from the ceiling, which is a familiar modern sculpture device, and among such attempts this seemed to me not an interesting one.

Q. Then you didn't personally gain any particular protest from this object? A. I felt it was the artist's intention to communicate something, but I personally did not feel politically stimulated by it.

Q. I am going to show you People's Exhibit 6, which you viewed this object at the gallery. Did you receive or was a political message conveyed to you by this artist? A. No. Once again, I would have to say the artist probably intended to convey a political message but of the social, of the materials involved also because there was a sound track in the gallery at the time and anti-war songs.

[121] Q. Please confine yourself to the opinion of the objects themselves, not the surroundings. A. I am trying to make clear what my experience was with the object on my first encounter. My own interest was purely a sculptural one. It seemed to me to take its place in what I say perfectly valid tradition and none the less not to be a very lofty example in that direction.

Q. I ask you to examine People's Exhibit 5. When you saw this object at the Radich Gallery, was any political message conveyed to you at that time? A. Once again, I felt the artist intended a political message, but my own interest in the object was aesthetic rather than political.

Q. Well, sir, were there any objects that were on exhibition at the gallery of those that we have introduced into evidence which conveyed to you a political message? A. No, I would say in the exhibition as a whole my impression was that the artist intended to convey a political message by his form of art, but my own interest in the exhibition was primarily aesthetic.

[122] Q. In viewing each of these objects individually, you could say no political message was imparted to you, is that correct? A. I would have to say I was aware that a

political message was intended but perhaps was not as interested in that. The intention wasn't as strong as the aesthetic intention.

Q. But there was none conveyed, no political message to you? A. Well, I suppose in some degree it was conveyed; if I was aware of the tension I was perhaps not receptive to it.

Q. Did you, in fact, get any message from any of these exhibits in the political vein? A. Well, I was—

Q. Something that was concrete?

Mr. Green: Let the witness answer.

Q. Something that was concrete in its form to you? A. Well, I was aware that the artist intended to make some anti-war statement, but I was not as receptive [123] to that intention as I was to the aesthetic intention which seemed much stronger.

Q. So then all you gained was an artist's attempt at some political message but none was conveyed in fact, to you? A. I think that is a reasonably correct.

Mr. Slater: I have no further questions.

Redirect Examination by Mr. Green:

Q. Mr. Kramer, there has been a reference to the message you got from a specific work in the exhibits in terms of the message the viewer gets from a work of art, sculpture, painting, whatever it is, collage; is the message that the viewer gets always the same for all viewers?

Mr. Slater: I'll object to the question.

Judge Strong: Yes, I have to sustain it.

Q. Is it your experience—

Judge Strong: That would be [124] a question for a psychologist.

Q. Is it in view of the work of art that you, as critics, see and the critical writings, and you, as a critic reading it, is it your experience all viewers get the same message from any given work of art? A. On the contrary, the diversions of response to works of art are notorious.

Q. The fact that you did not get a political message from these works of art, did this mean to you that nobody would get a political message from them?

Mr. Slater: I object to that question.

Judge Strong: Sustained.

Q. In terms of the works of art, Mr. Kramer, as critic do you recognize any difference between different types of art, sculpture, paintings, collage, in the 20th century?

Mr. Slater: I object to the question as to the form.

Judge Strong: He is not finished with the question.

Q. I'll rephrase the question. In terms of [125] 20th century art, sculpture, painting, collage; construction, are there any hard and fast distinctions that could let you label one as one thing and not another; are there things both considered three-dimensional works and paintings? A. The entire tendency is to break down distinctions between one category and another. There are still some sort of rough working categories, paintings, collage and so forth. At this history there is no hard and fast distinction.

Q. Are you familiar with the work of Louise Nibelson?
A. Yes, I am.

Mr. Slater: I will object. I think the People have been very liberal to question the defendant on redirect, but we are going too far astray on redirect. This could have been brought out on direct examination.

Judge Strong: Objection sustained.

Mr. Green: I have no [126] further questions.

Mr. Slater: No questions.

Judge Strong: Defendant rests?

Mr. Green: The defendant rests.

Mr. Slater: People rest.

Mr. Green: At this point, if it please the Court, I should like to renew my motion to dismiss on all the grounds, and without going into them with great detail that we stated at the close of the People's case, on the grounds the People have failed to make out a prima facie case. I would like to point out here, however, with specific respect—

Judge Strong: We ruled on a prima facie case.

Mr. Green: Yes, I understand that. I am renewing my motion now to dismiss at the close of all the evidence on the grounds that no case has been made out beyond a reasonable doubt that this defendant violated this statute. I think it's unnecessary [127] to restate, except for the record, that I restated the grounds that I made on the close of the People's case. To that I would like to add this: the only evidence in this case, what this defendant did, is that he was the proprietor of the art gallery in which these things were exhibited. There is no testimony whatsoever,

I am reading from subdivision d, "mutilated, defaced, defiled, defied," I don't know how you defy a flag, something, it could be done or trampled upon the flag. There is only one other thing left in subdivision d, and that is "cast contempt." As far as subdivision d, it doesn't say what you cast contempt on. That is the only subdivision in there.

Judge Strong: You made a point of that several times. I think, as a matter of construction, it's quite clear. It refers to the United States flag of America.

Mr. Green: I am not sure it does. All the other sections that mention that—

[128] Judge Comerford: I don't mean to interrupt you for the sake of interrupting you.

Mr. Green: I am going on from there.

Judge Comerford: What is the object of the entire subject?

Mr. Green: I would say the object of the entire section is something that the State has no power to do it. It was to restrain the conception of—

Judge Comerford: Give me the noun.

Mr. Green: Your Honor, I can't tell you that because the entire section doesn't have a noun. That is the very point I am making. The very letter subdivision in Section 16, subdivision 16, has no noun except number d, but if I may move on and not labor the point—

Judge Comerford: I was not talking about subsection d. I am talking about the section; what is the object of the entire section? Give me the noun of the entire section.

[129] Mr. Green: I can't tell you because if you take 1425 itself, malicious injury, to an injury of

property, it has to do with cutting timber, taking fish out of property.

Judge Strong: Subdivision 16.

Mr. Green: Subsection 16 refers in general to the flag, but subdivision d doesn't say a word about the flag.

Judge Strong: Is the word "flag" a noun or not a noun?

Mr. Green: It is a noun but it is not in subdivision d.

Judge Comerford: You say it's the subject of Section d?

Mr. Green: I don't say so. I say all the other subdivisions have as their objects the flag, but this one does not. But if I may go on, assume the word "flag" is read into subdivision d, although it's a criminal statute, I don't know how you could do that, assuming it's read in it, there is no testimony [130] that he mutilated the flag, defaced. He didn't make these sculptures, defiled it, trampled upon it. The only thing he did, his causing contempt upon it by exhibiting these sculptures. Now subdivision f is a charge that any person who shall publicly carry or display any emblem or flag which causes contempt upon the flag of the United States by word or act, so that you're limited here to what we are limited in considering this case is even, if you read the word "flag" into subdivision d, the only thing that is left in subdivision d on the evidence of this case is causing contempt, and the only thing in subdivision f is causing contempt. Causing contempt, by the nature of the word, involves intent. This is prohibited, such as the words, "causing contempt." You have to mean

something. You have to mean contempt to cause something into contempt. If you walk on a boy, a flag, and trip on it and knock it on the floor, that is not causing contempt. That requires some kind of affirmative reaction, [131] contempt. The only testimony in this case is by the defendant, who testified without contradiction by anybody that he intended no contempt of the flag. He is the defendant, not the artist. So on the basis of the grounds stated on my motion to dismiss at the close of the People's case, I move to dismiss now at the close of all the evidence, and on the further grounds that the People have failed to show any violation of either subdivision d or f of subsection 16 of this section of the Penal Law, because they have failed to show any causing of contempt, any intent to cause contempt, which is required by the nature by the defendant.

Mr. Slater: Subdivision d requires that the mutilation, defacement, defilement, trampling upon that caused contempt be done in public. The gallery, as the defendant states, was open to the public. Anyone could go there. In fact, one of the exhibits was on display in the window which was open [132] on the public street, as the People's witness has testified to. The People contend that by his act the defendant did cause contempt upon the flag as stated in subdivision d. As to subdivision f, this subdivision says: "Any person who shall display any emblem, plaque or flag which causes contempt by either word or contempt on the flag of America, violates this section." This statute clearly prohibits the conduct that this defendant was engaged in at the time these objects were on display at the gallery. These ex-

hibits very clearly cause contempt upon the flag of the United States. Viewing People's Exhibits 2, 3 and 4, I fail to see how anyone could interpret this conduct in any other way, and certainly the others of very little merit, and the People contend they, too, caused contempt upon the flag. Now, as far as the words "deface" and "defile" are interpreted, as I said earlier at the close of the State against Slaughter, the words "deface" and "defile" in a similar statute [133] were interpreted to mean dishonor, which imputes a lively sense of shaming or acquiescent callousness. Certainly the flag was shamed by the artist and the man who exhibited these flags. People rest.

Judge Strong: The bench feels that it needs a short period of time to consider this verdict. We will not be able to render it today. We'll put it over for Friday for decision.

Mr. Green: 9:30?

Judge Strong: Yes, thereabouts.

Mr. Green: I would like to thank the Court on behalf of the defendant. I think the issues here are complicated issues. I think they are very interesting issues, and I am grateful for the Court for giving them such careful and courteous attention, and I am also grateful for the Court's questions that sometimes gave me questions and made my questions a lot easier to make the point involved, [134] and I do appreciate the questions and thank the Court for them.

Mr. John J. Connley: Your Honor, my name is John J. Connley. I am counsel for Francis Giordano, the Judge Advocate for the American Legion. Your

Honors, due to the fact the evidence is over and the Court reserves decision, this is permission to file for amicus curiae.

Mr. Slater: No objection.

Mr. Green: I have no objection. I would like to be served with a copy of the brief. I don't know when the brief will be served.

Judge Strong: You have one ready.

Mr. Connley: Your Honor, we have done research. I would like to have it for Friday's decision.

Judge Strong: Will all parties please approach the bench.

Judge Basel: I think the [135] case was extremely well tried on behalf of both sides and I appreciate the fact that they have made it easier for the Court.

Judge Strong: Court will take a short recess.

The above is certified to be a true and correct transcript of the testimony.

MICHAEL JAY (Illegible)
Official Court Reporter.

Transcript of Sentence

CRIMINAL COURT OF THE CITY OF NEW YORK

PART 2B — COUNTY OF NEW YORK

Docket: B196

Charge: 1425

THE PEOPLE OF THE STATE OF NEW YORK,

Complainant,

—against—

STEPHEN RADICH,

Defendant.

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100 Centre Street
New York, New York

May 5, 1967

Before:

HONORABLE FREDERICK STRONG
HONORABLE AMOS S. BASEL
HONORABLE JAMES J. COMERFORD

APPEARANCES:

GERALD SLATER, Esq.
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Assistant District Attorney
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RICHARD GREEN, Esq.
Attorney for the Defendant
1270 Avenue of the Americas
New York, New York

JAMES RYAN,
Court Officer

RICHARD GROSS,
Court Reporter

[2] Court Officer: Number 35. Docket B196. Stephen Radich. Charged with 1425, Subdivision D and F of the Penal Law. This case is on the calendar for decision today.

Mr. Green: Richard Green, 1270 Avenue of The Americas.

Judge Strong: This case is on for decision today. I take it neither side has any further argument to make.

Mr. Slater: That is correct, Your Honor.

Mr. Green: That is correct.

Judge Strong: Both sides are ready for decision. By majority of the Court, the motion to dismiss is denied. The defendant is found guilty of the violation of Paragraph D, Subdivision 16, of Section 1425 of the Penal Law of the State of New York. Judge Rosel dissents and votes to acquit. I will deliver the opinion of the Court.

* * * * *

[The verbatim reading of the majority and dissenting opinions of the trial court are omitted. The opinion of the trial court is reproduced at pp. 25a-36a.]

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[20] Judge Strong: Does the defendant wish to waive the two day period and be sentenced at this time or not?

Mr. Green: We will waive the two day period, Your Honor. May I note my exception to the denial of the motion to dismiss.

Mr. Slater: The People have no objection to sentencing at this time.

Mr. Green: May we be heard?

Judge Strong: Yes.

Mr. Green: On the question of sentence the Court has found the defendant guilty. I would like to point out here—

Judge Strong: Stand up.

[21] Mr. Green: I would like to point out here that the defendant is also a war veteran and there has been this matter of the flag. The defendant is an honorably discharged war veteran who served in the Navy during World War Two, was a radio operator on the ship that carried the President of the United States to the Teheran Conferance and was in a sufficient position of trust to hold such an assignment in the Navy. I would also like to say that in terms of an issue such as this, forgetting the obvious questions of constitutionality, this Court which is really—this is the People's Court. This is the court, probably the court with which most of the people—to most of the people of New York is the only court which they will ever come into contact. I think this court has to take notice of the life around it in this great city of ours and this great state of ours. I pointed out in a reply brief and we are on sentencing. There is a painting using the American flag with potatoes inserted in the field of stars with a picture of the Governor of the State of New York in the stripes. This painting was, and I show it to the Court here, on the cover of the New York Times just two or three weeks ago, a notable [22] publication distributed not only in this state but throughout the country. Since that time the governor's collection of paintings is now opened and on display on 12th Street in New York at the New School and the circular advertising that art exhibit, Governor Rockefeller's collection from the Albany mansion uses for the ad that painting of a proported American flag with, I presume, Idaho potatoes stuck into it the word "Idaho" and a picture of the Governor of the State of New York put in among the stripes. What I am saying to the Court is essentially here as the District Attorney pointed out in his brief. There is a question of obscenity in this case. The issue is strictly the use of the flag. What

I am saying to the Court is that in this day and age the flag is used for many, many purposes. We introduced some exhibits at the trial. This, which is not an exhibit at the trial but which is something that exists in this city of ours, it is here today. It is as real as those buildings going up across the way. A court such as this, a People's Court, must take notice of the custodies of the mores of the city. I am sure that there are many of us who would feel to take potatoes and tear open a [23] hole in the flag and throw the potatoes in is contemptuous of the flag. It may well be. It doesn't mean it is something that should be prosecuted or forbidden, something for which a man should go to jail if he does it. In view of these things and in view of the use that is made of the flag all around us, you look at the theatrical ads in the newspapers in New York. There has been one running for a show I guess it is, which is the "Fugs" which uses an American flag. It goes in day after day in every paper in this city. There aren't many but we still have a few. That is in there every day and nothing happens. That is the life around us. This is what happens in the life around us. It seems to me that to impose any severe sentence, anything but a minimal sentence and then a suspended sentence at that on this defendant would be going contrary to everything that is happening in this city, in this state, and in this country today in terms of the use of the flag for purpose of expression.

Judge Strong: Thank you.

Mr. Slater: People have no statement to make.

Judge Strong: The Bench will confer. [24] Is there any legal cause why the defendant should not now be sentenced?

Mr. Green: No, Your Honor.

Judge Strong: Does he have any previous criminal record?

The Defendant: No, Your Honor, I have not.

Judge Strong: The Court takes a very serious view of this case and believes it should not be treated lightly. On the other hand the defendant, having no previous record as he says and having been apparently sincerely motivated, we do not feel that a prison term is indicated. However, we do feel that a substantial penalty should be imposed. The Court therefore sentences the defendant to pay the maximum fine of $500 in lieu thereof to serve 60 days in the Workhouse.

Mr. Green: Could I ask the Court to permit the defendant to pay his fine on Monday, May 8th that would be, and he be paroled in the meantime?

Judge Strong: Yes, parole continued to May 8th to pay the fine.

Mr. Green: Can we have a little more time? Can we make it a week from Monday? That [25] would be the 15th.

Judge Strong: All right, the 15th. Parole continued.

* * * * *

/s/ Richard Gross

I Certify That This Is a True and Accurate Transcript.